(16,817.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 604.

CHARLES E. BOLLES, PLAINTIFF IN ERROR,

vs.

THE OUTING COMPANY, LIMITED.

IN ERROR TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

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a United States Circuit Court of Appeals for the Second Circuit.

CHARLES E. BOLLES, Plaintiff in Error,
vs.
THE OUTING COMPANY, LIMITED, Defendant in Error.

Transcript of Record.

Error to the circuit court of the United States for the southern district of New York.

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States for the southern district of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you or some of you, between Charles E. Bolles, plaintiff, and The Outing Company, Limited, defendant, a manifest error hath happened, to the great damage of the said Charles E. Bolles, as is said and appears by his complaint, we, being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the judges of the United States circuit court of appeals for the second circuit of the city of New York, together with this writ, so that you have the same at the said place, before the judges aforesaid, on the 26 day of April, 1897, that, the record and proceedings aforesaid being inspected, the said judges of the United States circuit court of appeals for the second circuit may cause further to be done therein to correct that error what of right and according to the law and custom of the United States ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 21 day of April,
2 in the year of our Lord one thousand eight hundred and ninety-seven, and of the Independence of the United States the one hundred and —.

JOHN A. SHIELDS,
[SEAL.] *Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the* Southern *Circuit.*

The foregoing writ is hereby allowed.
N. Y., April 21, 1897.
E. H. LACOMBE,
Judge U. S. C. C.

UNITED STATES OF AMERICA, } ss:
Southern District of New York, }

I, John A. Shields, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify, that the following pages, numbered from 1 to 55 inclusive, contain a true and complete transcript of the record and proceedings had in said court in the cause of Charles E. Bolles, plaintiff in error, against The Outing Company, Limited, defendant in error, as the same remain of record and on file in said office.

In testimony whereof, I have caused the seal of the said court to be hereunto affixed at the city of New York, in the second circuit, this 21 day of April, in the year of our Lord one thousand eight hundred and ninety-seven, and of the Independence of the United States the one hundred and —.

[SEAL.] JOHN A. SHIELDS, *Clerk.*

3 Due and timely service of the within writ of error is admitted.

Dated New York, April 21, 1897.

JOHN R. ABNEY,
Att'y for Defendant in Error, Outing Co., Limited.

(Endorsed:) U. S. circuit court of appeals for second circuit. Charles E. Bolles, pl'ff in error, *v.* The Outing Company, Limited, def't in error. Writ of error. Wells, Waldo & Snedeker, attorneys for plaintiff in error, Mutual Life building, 34 Nassau street, New York. U. S. circuit court. Filed Apr. 21, 1897. John A. Shields, clerk.

United States Circuit Court for the Southern District of New York.

CHARLES E. BOLLES, Plaintiff,
against
THE OUTING COMPANY, LIMITED, Defendant. }

To the above-named defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of
4 the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, at the city of New York, this 18th day of April, in the year one thousand eight hundred and ninety-four.

[L. S.] JOHN A. SHIELDS, *Clerk.*

WELLS, WALDO & SNEDEKER,
Plaintiff's Attorneys.

Office and post-office address, 34 Nassau street, New York city.

Circuit Court of the United States for the Southern District of New York, in the Second Circuit, at the April Term, 1894.

CHARLES E. BOLLES, Plaintiff,
against
THE OUTING COMPANY, LIMITED, Defendant.

SOUTHERN DISTRICT OF NEW YORK, *ss:*

Charles E. Bolles, a citizen of the United States and a resident of the State of New York, within the city of Brooklyn, in the
5 United States, the plaintiff in this action, by Wells, Waldo & Snedeker, his attorneys, complains of The Outing Company, Limited, a corporation organized under the laws of the State of New York, carrying on its business and having its principal place of business in the said city of New York, and within the southern district of New York, defendant in this action, as follows, to wit:

The plaintiff says, upon information and belief, that The Outing Company, Limited, the defendant, is a corporation organized under the laws of the State of New York, carrying on its business in the city and county of New York, in the southern district of New York, and that its business is the publication of a certain pamphlet or monthly magazine, known by the name of *Outing*, and the publishing of other pamphlets, magazines and papers within the said city and county of New York.

For a first cause of action plaintiff says:

Firstly. That for many years prior to and at and since the times mentioned in this complaint, the plaintiff resided in and carried on business in the city of Brooklyn, county of Kings and State of New York, in the United States, said business being that of a photographer, and that he is and was well and favorably known in such business, and that said business was and is carried on and was and is known by the name of "Bolles," which is the plaintiff's business name, it being now and having been for many years a general custom in the photographic business, with persons carrying on the same, to use their surnames alone.

That heretofore and in or about the month of August, 1893, the plaintiff made, invented and designed a certain photograph and the negative thereof from a certain ship or sloop yacht, known
6 by the name of the *Vigilant*, at and within the said southern district of New York, and within the eastern district of New York, and that the same is the photograph hereinafter referred to, and that the title of said photograph is "Vigilant No. 4," being the number used to designate this particular photograph, and that a copy of said photograph, marked "Exhibit A, 1894," is hereto annexed and made a part of this complaint.

Secondly. And this plaintiff further says that the said photograph, the title of which is the "Vigilant No. 4," and which is the subject of this suit, is a new, useful, harmonious, characteristic and spirited picture, and that the same is the original invention and design of this plaintiff, for the reason that it was made by this plaintiff entirely from his own original selection and conception, to which he

gave visible form by selecting the moment when the outline of the said yacht, the light, shade, background and poise of said yacht combined to make a harmonious, characteristic and spirited picture, and selecting and choosing such conjunction of conditions through the means of a tugboat under his (plaintiff's) sole direction and control, and from such selection, choice and arrangement, made entirely by plaintiff, produced the picture which is the subject of this suit, and that the terms "author," "inventor," and "designer," as used in this complaint and in the art of photography, mean the person who so produces the photograph.

Thirdly. The plaintiff further showeth that he is the author, inventor, designer and proprietor of the certain photograph and negative thereof, the title or description of which is "Vigilant No. 4," and, being such author, inventor, designer and proprietor, and being a citizen of the United States, and desiring to obtain the copyright for the same, in conformity with the provisions of the Revised Statutes of the United States, this plaintiff, on the ninth day
7 of August, 1893, and before the publication thereof, did deposit in the mail within the United States, to wit, in the general post-office in the city of Brooklyn, in the State of New York, enclosed in a postpaid wrapper, directed to the Librarian of Congress, Washington, D. C., a printed copy of the title of said book or other article, to wit, of the said photograph, in the following words, to wit, "Vigilant No. 4," and duly paid the fee required by law for recording said title, to wit, the sum of fifty cents, to said Librarian of Congress, and that said Librarian of Congress did record the title of such book or other article, to wit, said photograph, in a book kept for that purpose, as required by law and by section 4957 of the Revised Statutes of the United States and the amendments thereof, and the said Librarian of Congress, A. R. Spofford, Esq., did thereupon give a copy of the title or description thereof, under the seal of the said Librarian of Congress, to *to* the said plaintiff, as proprietor thereof, for which the said plaintiff did pay him the fee required by law therefor, to wit, the sum of fifty cents.

Fourthly. The plaintiff further showeth, that on or before the day of publication thereof, to wit, on the ninth day of August, 1893, he did deposit in the mail within the United States, to wit, in the general post-office in the city of Brooklyn, in the State of New York, enclosed in a postpaid wrapper, directed to the Librarian of Congress at Washington, District of Columbia, two copies of such copyrighted book or other article, to wit, two copies of such photograph.

Fifthly. And the plaintiff further showeth, that having in all things complied with the conditions and provisions of the Revised Statutes of the United States in such case made and provided and amendments thereof, as aforesaid, he thereby obtained a copy-
8 right in the United States for said book or other article, to wit, for said photograph, in due form of law, and there was granted and secured to him, said plaintiff, and he had the sole liberty of printing, reprinting, publishing, completing, copying, executing and vending the same, for the term of twenty-eight (28) years from the

said time of recording the title thereof, to wit, from the ninth day of August, 1893.

Sixthly. And the plaintiff further showeth that he did duly give the notice of said copyright, as required in the said Revised Statutes of the United States, and the act amending the same, by inscribing upon some visible portion of the several copies of every edition published of said photograph, upon the face or front thereof, the following words, to wit, "Copyright '93, by Bolles, Brooklyn."

Seventhly. And the plaintiff further showeth, that thereupon and ever since he obtained said copyright, as aforesad, he has been the sole owner thereof, and has expended large sums of money in obtaining, making and publishing the said copyright photograph, and is entitled to all the benefits and advantages of the same; that he has made sufficient numbers of said copyright photograph, and had and has the same for sale to the public at a reasonable price, and is and was able to supply the public therewith, and is entitled to receive the profits to be derived therefrom, the exclusive and sole liberties so to him secured, as aforesaid, and that prior to the unlawful acts of the defendant hereinafter set forth, he made great gains and profits by his said copyright and the publication and vending of said copyright photograph.

Eighthly. And the plaintiff further showeth, upon information and belief, that while he, the said plaintiff, was lawfully in possession of his aforesaid rights and liberties and in the receipt of
9 gains and profits of said photograph, copyrighted as aforesaid, the defendant, The Outing Company, Limited, who are engaged in the business of publishing in the city of New York, as aforesaid, well knowing the premises and the rights so secured to the plaintiff, and without the consent of the plaintiff, the proprietor of the copyright, first obtained in writing, signed in presence of two or more witnesses, and within two years next before the commencement of this action, to wit, since the ninth day of August, 1893, and after the recording of said title as aforesaid, and within the term limited, to wit, within twenty-eight years from recording the title thereof, as aforesaid, at and within the said city of New York, and within the United States, engraved, etched, worked, cut and printed, either in whole or in part, or by varying the main design, with intent to evade the law, great numbers, to wit, forty thousand copies, of said copyright photograph, one of which copies is hereto annexed and marked "Exhibit B," and made a part hereof, and, knowing the same to be so printed, did sell, or did expose to sale, great numbers, to wit, forty thousand copies thereof, at the said city of New York, within the southern district of New York, and within the United States, all contrary to the statute in such case made and provided, and contrary to section 4952 and section 4965 of the Revised Statutes of the United States and amendments thereof, and to the great damage of the plaintiff, whereby by force of the statute, defendant forfeited to plaintiff, the proprietor of said copyright photograph, all the plates on which the same were copied, as aforesaid, and that the value of said plates is and was one hundred dollars, and that by reason of the premises the said defendant also forfeited

to the plaintiff, the proprietor of said copyright photograph, every sheet thereof, to wit, all the aforesaid forty thousand copies, either printed or copied, and that the value of said sheets of forty
10 thousand copies is ten thousand dollars, whereby there accrued to the said plaintiff the aggregate of said several sums, to wit, the sum of ten thousand one hundred dollars, for which said sum of ten thousand one hundred dollars the plaintiff claims judgment against the defendant.

For a second cause of action plaintiff says:

Firstly. That for many years prior to and at and since the times mentioned in this complaint the plaintiff resided in and carried on business in the city of Brooklyn, county of Kings and State of New York, in the United States, said business being that of a photographer, and that he is and was well and favorably known in such business, and that said business was and is carried on and was and is known by the name of "Bolles," which is this plaintiff's business name, it being now and having been for many years a general custom in the photographic business, with persons carrying on the same, to use their surnames alone.

That heretofore and in or about the month of August, 1893, the plaintiff made, invented and designed a certain photograph and the negative thereof from a certain ship or sloop yacht, known by the name of the *Vigilant*, at and within the said southern district of New York and within the eastern district of New York, and that the same is the photograph hereinafter referred to, and that the title of said photograph is "Vigilant No. 4," being the number used to designate this particular photograph, and that a copy of said photograph, marked "Exhibit A, 1894," is hereto annexed and made a part of this complaint.

Secondly. And this plaintiff further says that the said photograph, the title of which is "Vigilant No. 4," and which is
11 the subject of this suit, is a new, useful, harmonious, characteristic and spirited picture, and that the same is the original invention and design of this plaintiff, for the reason that it was made by this plaintiff entirely from his own original selection and conception, to which he gave visible form by selecting the moment when the outline of the said yacht, the light, shade, background and poise of said yacht combined to make a harmonious, characteristic and spirited picture, and selecting and choosing such conjunction of conditions through the means of a tugboat under his, plaintiff's, sole direction and control, and from such selection, choice and arrangement, made entirely by plaintiff, produced the picture which is the subject of this suit, and that the terms "author," "inventor" and "designer," as used in this complaint and in the art of photography, mean the person who so produces the photograph.

Thirdly. The plaintiff further showeth that he is the author, inventor, designer and proprietor of the certain photograph and negative thereof, the title or description of which is "Vigilant No. 4," and, being such author, inventor, designer and proprietor, and being a citizen of the United States, and desiring to obtain the copyright for the same, in conformity with the provision of the Revised Statutes

of the United States, this plaintiff, on the ninth day of August, 1893, and before the publication thereof, did deposit in the mail within the United States, to wit, in the general post-office, in the city of Brooklyn, in the State of New York, enclosed in a postpaid wrapper, directed to the Librarian of Congress, Washington, D. C., a printed copy of the title of said book or other article, to wit, of the said photograph, in the following words, to wit, "Vigilant No. 4," and duly paid the fee required by law for recording said title, to wit,
12 the sum of fifty cents, to said Librarian of Congress, and that said Librarian of Congress did record the title of such book or other article, to wit, said photograph, in a book kept for that purpose, as required by law and by section 4957 of the Revised Statutes of the United States and the amendments thereof, and the said Librarian of Congress, A. R. Spofford, Esq., did thereupon give a copy of the title or description thereof under the seal of the said Librarian of Congress, to the said plaintiff, as proprietor thereof, for which the said plaintiff did pay him the fee required by law therefor, to wit, the sum of fifty cents.

Fourthly. The plaintiff further showeth, that on or before the day of the publication thereof, to wit, on the 9th day of August, 1893, he did deposit in the mail within the United States, to wit, in the general post-office in the city of Brooklyn, in the State of New York, enclosed in a postpaid wrapper, directed to the Librarian of Congress, at Washington, District of Columbia, two copies of such copyrighted book or other article, to wit, two copies of such photograph.

Fifthly. And the plaintiff further showeth, that having in all things complied with the conditions and provisions of the Revised Statutes of the United States in such case made and provided and amendments thereof, as aforesaid, he thereby obtained a copyright in the United States for said book or other article, to wit, for said photograph, in due form of law, and there was granted and secured to him, said plaintiff, and he had the sole liberty of printing, reprinting, publishing, completing, copying, executing and vending the same, for the term of twenty-eight (28) years from the said time of recording the title thereof, to wit, from the ninth day of August, 1893.

Sixthly. And the plaintiff further showeth, that he did duly
13 give the notice of said copyright, as required in the said Revised Statutes of the United States, and the act amending the same, by inscribing upon some visible portion of the several copies of every edition published of said photograph, upon the face or front thereof, the following words, to wit: "Copyright, 1893, by Bolles, Brooklyn."

Seventhly. And the plaintiff further showeth, that thereupon and ever since he obtained said copyright, as aforesaid, he has been the sole owner thereof and has expended large sums of money in obtaining, making and publishing the said copyright photograph, and is entitled to all the benefits and advantages of the same; that he has made sufficient numbers of said copyright photograph, and had and has the same for sale to the public at a reasonable price, and is and was able to supply the public therewith, and is entitled to re-

ceive the profits to be derived therefrom, the exclusive and sole liberties so to him secured, as aforesaid; and that prior to the unlawful acts of the defendant hereinafter set forth, he made great gains and profits by his said copyright and the publication and vending of said copyright photograph.

Eighthly. And the plaintiff further showeth, upon information and belief, *and* while he, the said plaintiff, was lawfully in possession of his aforesaid rights and liberties and in receipt of the gains and profits of said photograph, copyrighted as aforesaid, the defendant, The Outing Company, Limited, who are engaged in the business of publishing in the city of New York, as aforesaid, well knowing the premises and the rights so secured to the plaintiff, and without the consent of the plaintiff, the proprietor of the copyright, first obtained in writing, signed in presence of two or more witnesses, and within two years next before the commencement of this action,
14 to wit, since the ninth day of August, 1893, and after the recording of said title as aforesaid, and within the term limited, to wit, within twenty-eight years from recording the title thereof, as aforesaid, at and within the said city of New York, and within the United States, engraved, etched, worked, cut and printed, either in whole or in part, or by varying the main design, with intent to evade the law, great numbers, to wit, forty thousand copies, of said copyright photograph, one of which copies is hereto annexed and marked "Exhibit B," and made a part hereof, and, knowing the same to be so printed, did sell, or did expose to sale, great numbers, to wit, forty thousand copies thereof, at the said city of New York, within the southern district of New York, and within the United States, all contrary to the statute in such case made and provided, and contrary to section 4952 and section 4965 of the Revised Statutes of the United States and amendments thereof, and to the great damage of the plaintiff, whereby by force of the statute, defendant forfeited to plaintiff, the proprietor of said copyright photograph, all the plates on which the same were copied as aforesaid, and that by reason of the premises the said defendant also forfeited to the plaintiff, the proprietor of said copyright photograph, every sheet thereof, to wit, all the aforesaid forty thousand copies, either printed or copied, and that by reason of the said premises the said defendant also further forfeited one dollar for every sheet of the same found in its possession, either printed, printing, copied or exposed for sale, and the plaintiff avers that there were found in the defendant's possession, and sold and exposed for sale by it, at and before the time of the commencement of this suit, forty thousand of such copies, whereby there accrued to said plaintiff the sum of forty thousand dollars, for which said sum of forty thousand dollars the plaintiff claims judgment against the defendant.

15 Wherefore plaintiff demands judgment against the defendant appropriate to the facts set up in the complaint, and for relief accordingly, with costs.

CHARLES E. BOLLES,
By WELLS, WALDO & SNEDEKER,
His Attorneys.

G. E. WALDO, *Of Counsel.*

NOTE.—The exhibits mentioned may be seen at the office of Wells, Waldo & Snedeker, the attorneys for plaintiff, No. 34 Nassau street, New York city.

(Endorsed:) Circuit court of the U. S., southern district of N. Y. Charles E Bolles *v.* The Outing Company, Limited. Summons & complaint. Wells & Waldo, attorneys for plaintiff, 34 Nassau street, New York. I hereby certify, that on the 20th day of April, 1894, at the city of New York, in my district, I personally served the within summons and complaint upon the within-named The Outing Company, Limited, by exhibiting to James H. Worman, president of said company, the within original, and at the same time leaving with him a copy of each thereof. John W. Jacobs, United States marshal, southern district of New York. Dated May 22, 1894. U. S. circuit court. Filed May 22, 1894. John A. Shields, clerk.

16 Circuit Court of the United States for the Southern District of New York, in the Second Circuit.

CHARLES E. BOLLES, Plaintiff,
against
THE OUTING COMPANY, LIMITED, Defendant.

The Outing Company, Limited, answering the complaint herein, by John R. Abney, its attorney, for answer thereto says:

I.

As to the first alleged cause of action:

1. That it denies any knowledge or information sufficient to form a belief as to each and every allegation contained in the first paragraph, down to the second paragraph, under the first alleged cause of action, in the complaint contained, except the fact that at and since the times mentioned in the complaint the plaintiff resided in and carried on business in the city of Brooklyn, county of Kings and State of New York, in the United States, said business being that of a photographer.

2. That it denies any knowledge or information sufficient to form a belief as to each and every allegation contained in para-
17 graphs second, third, fourth, fifth and seventh of the said first alleged cause of action in the complaint.

3. That it denies any knowledge or information sufficient to form a belief as to each and every allegation contained in the sixth paragraph of the said first alleged cause of action in the complaint; and, upon information and belief, it denies that the plaintiff did duly give the notice of said alleged copyright, as required in the Revised Statutes of the United States and the acts amending the same.

4. And it denies each and every allegation contained in the eighth paragraph of the first alleged cause of action in the complaint.

II.

As to the second alleged cause of action:

1. That it denies any knowledge or information sufficient to form a belief as to each and every allegation contained in the first paragraph, down to the second paragraph, under the second alleged cause of action in the complaint contained, except the fact that at and since the times mentioned in the complaint, the plaintiff resided in and carried on business in the city of Brooklyn, county of Kings and State of New York, in the United States, said business being that of a photographer.

2. That it denies any knowledge or information sufficient to form a belief as to each and every allegation contained in paragraphs second, third, fourth, fifth and seventh of the second alleged cause of action in the complaint.

3. That it denies any knowledge or information sufficient
18 to form a belief as to each and every allegation contained in the sixth paragraph of the said second alleged cause of action in the complaint; and upon information and belief, it denies that the plaintiff did duly give the notice of said alleged copyright, as required in the Revised Statutes of the United States and the acts amending the same.

4. And it denies each and every allegation contained in the eighth paragraph of the second alleged cause of action in the complaint.

Wherefore the defendant asks that the complaint be dismissed, with costs and disbursements.

JOHN R. ABNEY,
Attorney for Defendant, 80 Broadway, New York.

CITY AND COUNTY OF NEW YORK, *ss:*

James H. Worman, being duly sworn, deposes and says: That he is the president of The Outing Company, Limited, the defendant in the above-entitled action; that the foregoing answer is true, to the knowledge of deponent, except as to the matters therein stated to be alleged on information and belief, and that as to those matters he believes it to be true; that the reason why this verification is made by the defendant is that said defendant is a corporation.

JAMES H. WORMAN.

Sworn to before me this 22d day of June, 1894.

THOS. ELDRIDGE,
Notary Public (No. 35), N. Y. City and County.

19 At a stated term of the circuit court of the United States of America, for the southern district of New York, in the second circuit, held at the United States court-rooms in the city of New York, on Monday, the 5th day of April, in the year of our Lord one thousand eight hundred and ninety-seven.

Present: The Honorable E. Henry Lacombe, circuit judge.

CHARLES E. BOLLES
v.
THE OUTING COMPANY, LIMITED.

Now comes the plaintiff, by George E. Waldo, Esq., his attorney, and moves the trial of this case. Likewise comes the defendant by John R. Abney, Esq., its attorney. Thereupon a jury is impanelled and the cause proceeds to trial.

Under stipulation of counsel for the respective parties, the record of the first trial of this action is considered as read in evidence on this trial, beginning at folio 59 down to and including folio 111, together with exhibits.

Counsel for the defendant thereupon moves for direction of verdict for the defendant, which motion is denied.

The court thereupon directs the jury to find a verdict for the plaintiff in the sum of $1.00. Thereupon the jury says that it finds a verdict for the plaintiff for the sum of $1.00.

20 Thereupon counsel for the plaintiff moves for a new trial, which motion is denied.

(An extract from minutes of trial.)

[SEAL.] JOHN A. SHIELDS, *Clerk.*

United States Circuit Court, Southern District of New York.

CHARLES E. BOLLES, Plaintiff,
against
THE OUTING COMPANY, LIMITED, Defendant.

This cause having been regularly brought on for trial upon the issues formed by plaintiff's complaint and defendant's answer before Hon. E. Henry Lacombe and a jury, all the parties being represented by counsel, and the evidence having been presented and heard, and a verdict having been rendered for one dollar in favor of the plaintiff, by direction of the court, and the plaintiff's costs having been duly adjusted at sixty-three and thirty-five one hundredths dollars:

Now, on motion of Wells, Waldo & Snedeker, attorneys for the plaintiff, it is

21 Adjudged, that the plaintiff, Charles E. Bolles, recover of the defendant, The Outing Company, Limited, the sum of one dollar, and his costs adjusted as aforesaid at sixty-three and thirty-five one hundredths dollars, making in all the sum of sixty-four and thirty-five one hundredths dollars ($64.35), and that the plaintiff have execution against said defendant, The Outing Company, Limited, therefor.

Judgment signed this 17th day of April, 1897.

JOHN A. SHIELDS, *Clerk.*

SIR: Take notice that the within is a copy of a judgment this day duly entered in this action in the office of the clerk of this court.

Dated New York, April 17th, 1897.

Yours, &c.,

WELLS, WALDO & SNEDEKER,
Attorneys for Plaintiff, 34 Nassau Street, New York City.

To John R. Abney, Esq., 2 Wall street, New York city.

(Endorsed:) U. S. circuit court. Charles E. Bolles, pl'ff, against The Outing Company, Limited, def't. Judgment. John R. Abney, attorney for def't., 2 Wall street, New York city. U. S. circuit court. Filed Apr. 17, 1897. John A. Shields, clerk.

22 Circuit Court of the United States for the Southern District of New York.

CHARLES E. BOLLES, Plaintiff,
against
THE OUTING COMPANY, LIMITED, Defendant. } Bill of Exceptions.

Appearances.

For plaintiff, Wells, Waldo & Snedeker; B. Lewinson, of counsel.
For defendant, John R. Abney.

Be it remembered, that on the 5th day of April, 1897, the aforesaid action came on for trial at a trial term of this court, before Honorable E. Henry Lacombe, one of the justices thereof, and a jury, and on the trial of the said issue, the plaintiff, to maintain the same, was sworn and examined as a witness in his own behalf, and testified as follows:

I reside in Brooklyn, State of New York.

My place of business is at the corner of Fulton and Clark streets; otherwise 242–244 Fulton street. My business is photography.

I was born in the city of Providence, State of Rhode Island, and have lived in this country ever since. My father and mother were both citizens of the United States; both born in New England, one in Providence and the other in Connecticut, and lived there all their lives.

I have been a resident of Brooklyn, with the exception of
23 one or two short interims, since January, 1871. I commenced to make photographs in 1867 or 1868, perhaps earlier than that, and have been in that business ever since. I commenced business for myself in Brooklyn in May, 1879. I have made a specialty of photographing yachts in motion; since the very early part of 1892 I have devoted all of my time to that specialty, in the proper season, in securing the photographs and selling them; otherwise whenever I could.

That which you now hand me is a photograph of the yacht *Vigilant* made by me and copyrighted under the title of "Vigilant No. 4." I personally made the negative from which that photograph

was made. The negative was made on the waters of Long Island sound. I secured the image on my negative plate on the sound, on one of the days this boat raced, the 7th of August, 1893. It was taken on Long Island sound, in the vicinity of Glen Cove. It was along the Long Island shore of the sound where the race took place, within two miles from that shore.

Q. What did you do to secure that negative which resulted in that picture?

A. I knew that this yacht *Vigilant* was to sail in the race at Glen Cove for the commodore's cup, at the beginning of the August cruise, and being anxious to secure a photograph of her, I engaged a tugboat, subject to my own control and direction. I proceeded to the point of the races, looked over the course, found where the starting line was, and a few moments before the start of the race, in order that I might, as I thought, have a better position, I proceeded in the direction in which the yachts were to go when they started over the line. Having taken up a position, a general position, some three-quarters of a mile in advance of the starting line, a distance sufficiently far in advance *of* this yacht to be in proper trim,

24 under proper headway and have all her sails in order, and in the most artistic and most beautiful position when she came along, I then watched her advance towards me, directing my captain to proceed slowly in the same general direction, keeping my eye upon the boat as she advanced, watching carefully for all the lines and the shadows, the lights and shades, and I directed my tugboat, by direction to the captain, in such a position as to proceed with the yacht under sail. I had many opportunities to make a photograph of her before I selected this one, but I waited until I saw the light and shade, the poise of the boat, the action of the boat upon the water, the action of the wind upon the sails, the water under her bow, and the sky, composing the most artistic and beautiful combination, waiting also until I proceeded sufficiently far to avoid mixing the boat up with others that were seen upon the sound. I then took my camera, which had been ready all this time, and pointing it at the boat secured my impression. That was my impression as you see it here, but not the picture until developed. Then, at the end of the day's work, having secured my impression upon my negative and returning home to my place of business, I went into my dark room, or chemical-room—perhaps some of you know something of the character of the chemical-room. The image on the plate is latent; nothing whatever is visible to the eye. No means can be found to determine whether there is an image upon the sensitive plate, except through chemical treatment, and this chemical treatment requires judgment, taste, knowledge, experience, otherwise all the effect of light and shade and perspective may be destroyed in the plate which you have secured at so much expense and trouble. I developed my plate under these conditions and secured the negative from which this photograph has been printed. This photograph is one of the copies made from that negative.

25 Q. How is a photograph like that made from a negative?

A. The glass plate, which has a gelatine film containing

the image upon it, is placed in a wooden frame, and upon the gelatine side of the negative is placed a piece of paper sensitized with chloride of silver. Having been placed flatly upon the negative, this piece of paper is backed by a soft piece of cloth or paper to keep it in contact. There is an adjustable back to the frame put upon it and clasped down in position, so as to make absolute contact with the negative plate. This frame containing the negative and sensitized paper is then put out or exposed to daylight, and the frame is so arranged that it can be looked at from time to time, to notice the progress of the impression of the image upon the sensitized paper by the action of the light. When the action has gone sufficiently far, in our experience and practice, we remove that and substitute another. At the end of the day, this photograph, along with the others that we may have obtained, is treated chemically to various solutions, washing, &c., to bring the picture to the condition which you see. It is then washed for several hours in abundance of water, to remove all traces of the chemicals, that would otherwise destroy the picture, and then mounted upon this card-board. That finishes the operation.

Q. What did you do with the copies which you made from that negative, in regard to copyrighting it?

A. In this case, the first two photographs which were made from this negative were stamped with my copyright stamp, were entitled with the title I had selected "Vigilant No. 4;" were enclosed in an envelope addressed to the Librarian of Congress, together with a further copyright title containing the title, "Charles E. Bolles, Brooklyn, N. Y., Vigilant No. 4," also enclosing the fee for registering the copyright, and a note to the librarian.

26 Photograph "Vigilant No. 4," marked Exhibit A for identification.

I mailed those two copies to the Librarian of Congress on the 9th day of August, 1893.

Certificate of the deposit of the title of the photograph "Vigilant No. 4" with the Librarian of Congress on August 10, 1893, offered in evidence, admitted and marked Exhibit B, and a copy thereof annexed to the bill of exceptions.

Certificate of the Librarian of Congress of the deposit of two copies of the photograph "Vigilant No. 4," on August 10, 1893, offered and admitted in evidence and marked Exhibit C, and a copy thereof annexed to this bill of exceptions.

I enclosed with these two copies the fee for copyrighting, and either the postage on the envelope I deposited, or used the copyright frank, the copyright label which the librarian furnishes; either the postage was paid or the frank used, and these were mailed before the publication of this picture or the sale of any number of them. They were the first two copies made from the negative. This photograph marked "Exhibit A for identification" is a copy of the photographs which were deposited, and is a photograph printed

from the same negative. It is the one just marked Exhibit A, and referred to in the complaint.

Exhibit A for identification admitted, marked in evidence, and a copy thereof annexed to this bill of exceptions.

There has never to my knowledge been issued from this negative a photograph which was not stamped with the copyright as
27 shown here. I have had possession of this negative from which the picture, Exhibit A, was taken, ever since it was made. No one else had access — or control of it. The two copies which were filed with the Librarian of Congress, as I have testified, were of this same edition and of the best edition issued by me. Just the same as this.

Q. Look at this copy of the *Outing* magazine, at the front page of the cover and at page 161, and state what that is.

A. That is a reproduction of my copyrighted photograph, "Vigilant No. 4," Exhibit A.

Q. Look also at page 161 and see what that is.

A. That is also a reproduction of my copyrighted photograph, "Vigilant No. 4," Exhibit A.

Q. Why do you say that is a reproduction of your photograph?

A. Because in every line, every detail, every minutiæ, everything composing the picture, it is a reproduction, an accurate reproduction, of my photograph.

Book marked Exhibit D for identification.

I never authorized the publication of this photograph, Exhibit A, without the copyright imprint.

Cross-examination by Mr. ABNEY:

Q. You say you have been in business in Brooklyn, as a photographer, since 1879, on your own account?

A. Yes.

Before that I worked for the photographer in Brooklyn, Frank Pearsall. I began work for him in 1871, when I first came to Brooklyn. My business for two or three years prior to that time was employment in other photographic establishments in Philadelphia and in New York a short time, and one or two places in the West. I began to make pictures of yachts about the middle
28 of May, 1892. The negative of which I have been speaking is in my establishment on the other side of the bridge, in Brooklyn. That negative was taken on the 7th day of August, 1893, on the Long Island side of the sound, off Glen Cove harbor, and I presume nearer Glen Cove than any other town; somewhere between 12 and 2 o'clock; the exact time I cannot determine, because I kept no trace of time in the excitement of the moment.

Q. You were excited, were you?

A. Naturally excited in a thing of that kind. Every man with an artistic temperament, seeing such a thing of that kind, throws aside questions of hours and minutes.

This was a race between Glen Cove, Lloyd's Neck and return. I think I left there between four and five. I do not remember the exact hour, but until the finish of the race.

Q. Do you know what became of the *Vigilant* after the race?

A. I know what became of her five minutes afterwards. She broke down after I made my picture; less than five minutes afterwards she was dismasted; her topmast was gone and her bowsprit broken off.

There were a few other boats observing the race; spectators like myself. There was one other photographer there that I know of. He was on another boat.

Q. How many tugs did you notice about there that day?

A. My recollection does not serve me in regard to that at this distance.

Q. About how many?

A. I know there was this other tug called the *Photographer*. I believe there was another tug for the judges of the race. There always is; that is, for the regatta committee and their guests; and the tug I controlled. There may have been others that I do not recall.

29 The other photographer was Mr. Stebbins, of Boston. He was not near me when I took my photograph. He placed himself at the starting line. There were no other boats near me when I took my photograph, to my recollection; I believe not.

Q. How far were you from the *Vigilant* when you took this photograph?

A. I was not nearer than 300 feet; probably between that and 500 feet.

Q. What other boats were in this race besides *Vigilant?*

A. There was the *Colonia*, her competitor, also a candidate for cup defender; there was the *Queen Mab*, *Hildergarde*, and the sloops, important sloops, *Ailsa*, *Ariel*, *Dauntless*, *Romona*.

The COURT: Is it necessary to have them all?

Mr. ABNEY: No.

Q. Did you take photographs of the other boats?

A. I took a number of photographs that day of other boats besides *Vigilant*.

Q. How many photographs did you take of *Vigilant?*

A. That was all I took that day.

Q. Just one?

A. Just one.

Q. Before that day had you taken pictures?

A. Yes.

Q. Where did you take a former picture?

A. On the day she sailed, at Newport, within an hour of the sailing. That was the 1st of July. I made photographs of that negative. I copyrighted those. They were published in the newspapers. I had them published in *Frank Leslie's Magazine*.

Q. Look at the copy of *Frank Leslie* which I show you, dated July

20, 1893, and state whether the first picture in that paper is your photograph, a reproduction of it.

A. That is a reproduction of my photograph.

30 Paper referred to marked Exhibit 1 for identification.

Mr. ABNEY: Was that published as an advertisement, or did they pay you for it?

A. They paid me.

Q. When did you take another photograph of *Vigilant* after July 1st?

A. On August 3d.

Q. Where was that taken?

A. City Island.

Q. Was that photograph published?

A. Both in *Leslie's* and in *Outing*.

Q. What was the number of that photograph?

A. Vigilant No. 3.

Q. What sort of a camera did you use on August 7th, when you took the negative you have referred to?

A. I used a camera that I have constructed for myself, a hand camera; made after my own design and pattern.

Q. A hand camera?

A. A hand camera; a camera to be held in the hand; more commonly called a detective camera.

Q. Did you patent that camera?

A. No.

Q. Has that camera a snap-shot action?

A. It has a shutter; yes, sir.

By Mr. ABNEY:

Q. Did you take any other shot at this *Vigilant* on the 7th of August, 1893, than the one you have testified to?

A. No.

Q. Did you take any other photographs of the *Vigilant* after that time?

A. Other days?

Q. Yes.

31 A. A number.

Q. How many have you taken?

A. Roughly estimating, probably twenty.

Q. And you copyrighted them all?

A. All but two or three very small ones.

Q. Have you never permitted that photograph to be published by the papers without the notice of copyright being placed upon it?

A. It has never been published with my permission without the copyright notice.

Q. Has it ever been published without pay to you?

A. In two instances.

Q. What two?

A. One to a photographic magazine published by Mr. Loeber on

Seventeenth street, I cannot recollect the name of it just at this moment, and the other to the *American Amateur Photographer*.

Q. How many papers published this particular photograph, or copies of it, "Vigilant No. 4"?

A. I think it was reproduced in four instances, to my knowledge.

By the COURT:

Q. There were two, one by Loeber and the other by the *American Amateur Photographer?*

A. Yes, sir.

By Mr. ABNEY:

Q. And two others?

A. The *Outing* was the third.

Q. And the fourth?

A. A paper called *Once a Week*.

Q. How often have your subsequent pictures of *Vigilant* been published, that is, pictures taken after No. 4?

A. I could not go into that. I know there have been many of them published.

32 Q. There were a great many pictures taken of *Vigilant* about that time by other photographers, were there not?

A. Yes, sir.

Q. There were a great many photographers who took *Vigilant?*

A. Not a great many. There were some.

Mr. ABNEY: I wish a letter written by F. C. Beach to C. E. Bolles, in September or October, 1893, requesting leave to publish photograph of the yacht *Vigilant*.

Mr. LEWINSON: We produce letter of that date from F. C. Beach to Bolles, requesting leave to publish pictures of *Valkyrie*. Mr. Abney says this is not the letter he wants. Then he calls for a letter from Stieglitz to Bolles, asking permission to publish *Vigilant*, and we produce it.

Mr. ABNEY: I did not call for a letter from Stieglitz to Mr. Bolles.

Mr. LEWINSON: No such letter as asked for has been received.

The COURT: Then no such letter has been produced.

Mr. ABNEY: I want, second, the reply of C. E. Bolles to said letter of C. E. Beach.

Mr. LEWINSON: We cannot answer that unless we can ask Mr. Bolles.

Mr. ABNEY: I want them, third, to produce any letter written by C. E. Bolles to the Outing Co., Limited, or J. H. Worman, after the date of said letter of F. C. Beach. That was in September or October, 1893, in regard to *Vigilant*.

Mr. WALDO: There was no such letter. Here is a letter we received from Mr. Beach, but that is the only one we received, dated September 26th.

Mr. ABNEY: After, say that date, the 25th of September; a letter from Mr. Bolles, the plaintiff, to J. H. Worman, or the Outing Co.

33 Mr. LEWINSON: Here is the letter and reply. I produce a further letter dated November 4th. Those are the only copies of letters sent by us to Outing that we have.

Mr. ABNEY: I ask that the letter from Charles E. Bolles, dated November 1, 1893, to Outing Co., Limited, be marked for identification.

Marked Exhibit 2 for identification.

Q. Look at this letter from the Outing Company to you, dated November 3d, and say whether that letter was received by you.

A. It was received by me.

Marked Exhibit 3 for identification.

Q. Look at this copy, dated November 4, 1893, and state whether that is a copy of a letter you wrote to Outing Company.

A. Yes, that is mine.

Marked Exhibit 4 for identification.

Q. Look at the letter I hand you, dated November 7, 1893, and state whether that letter was received by you from Outing Co., Limited.

A. It was.

Marked Exhibit 5 for indentification.

Q. Did you write any letter after that to the Outing Co.?

A. If my memory serves me, the last letter you have there was the final communication to the Outing Co.

Mr. LEWINSON: Now, I offer in evidence these exhibits for identification, Exhibits 2, 3 and 4. They have been called for by the other side, and consequently we are entitled to have them in evidence.

34 Exhibits 2, 3 and 4 for identification are marked in evidence and copies thereof annexed to this bill of exceptions.

Redirect examination by Mr. LEWINSON:

Q. What is the trade name you used in your business?

A. Bolles.

My copyrights are in that name. I have been using that name ever since I have been in business.

RICHARD H. RIDGE, sworn and examined on behalf of plaintiff, by Mr. Lewinson, and testified as follows:

I live in Brooklyn and do business in New York. I am a member of the Fless & Ridge Printing Company. I am an officer of that company. I am president. Their business is printing. They are not publishers; they simply print. They did, in November, 1893, at the request and in the hire of "Outing," print the issue of November, 1893, of that magazine.

Q. Look at Exhibit D for identification, and state whether that

is the magazine, the November issue of 1893, that you printed for and at the request in the hire of *Outing*.

A. Yes.

Q. Were all the copies of that issue alike?

A. They were not.

Q. In what *request* were they not alike?

A. There was a cut changed.

Q. What cut?

A. I cannot tell.

Q. Which cut was changed?

A. I do not know.

Q. How do you know that a cut was changed?

A. Because there was a stoppage of the forms for a change of cut. We have no record of the specific cut.

35 Q. Did all the copies of *Outing* for that issue have this cover?

A. I could not swear to that.

Q. Was the cut a cut on the cover or a cut within?

A. I cannot answer that.

By the COURT:

Q. You mean you do not know?

A. I do not know.

By Mr. LEWINSON:

Q. You do not know whether the forms were stopped for the cover or the inside?

A. I do not know.

Q. The inside is printed on sheets which are subsequently folded?

A. Yes.

Q. And the cover is printed separately.

A. Not separately, but collectively?

Q. I mean to say that the cover is no part of the inside matter that is printed?

A. No, sir.

Q. The cover is printed by itself?

A. Yes, sir.

Q. And the reading matter, with the illustrations, articles are printed by themselves?

A. Yes.

Q. Does it happen very often that you have to stop the forms because a cut is changed after you have gone to press?

A. It does.

Q. Don't you remember whether in this particular issue the printing was stopped because the form was to be changed in the cover or the interior matter?

A. I do not.

Q. But you do know that you stopped printing and that a cut was changed?

36 A. I do know.

Q. You know that?

A. I know it from information from my employees.
Q. But you do not know for which one of the cuts?
A. No, sir. If you will allow me to explain it I will explain it.
Q. No. You say that took place because a cut had to be changed?
A. Yes, sir.
Q. And you do not know which one?
A. No, sir.
Q. But is it only a cut that was changed—or the whole paper?
A. The whole paper? No.
Q. And your information and all you know is that a cut was changed?
A. That a cut was changed, yes.
Q. And you do not know whether it is the cover or the inside?
A. No.
Q. Except for the change of a cut, the magazines were all alike of that issue, so far as you know?
A. No, sir.
Q. What else was there?
A. You will have to let me explain if you want that answer definitely and more correctly.
Q. So far as you know?
A. So far as I know I will give my explanation.
Q. So far as you know, with the exception of this change of a cut for which you stopped the forms, the issues of that paper were alike?

The COURT: What is the question?

Q. Were they or weren't they alike?
A. Read that question, please.
Q. Excepting for this cut you speak of, on account of which——
A. I am not speaking of any specified cut.

37 Q. Well, whatever cut you have in mind; with the exception of a cut you speak of, on account of which the forms were stopped, were or were not the numbers of that issue alike?

A. The order did not come down from the Outing Co.——

The COURT: You must answer the question.
The WITNESS: I cannot answer that.

By the COURT:

Q. You said the numbers were not all alike, because there was a cut changed. Now, taking that out, except for that cut that was changed, were they alike?
A. They were not alike.
Q. In what respect did they differ?
A. That I cannot answer. The Outing Co. gives us the order to go ahead in the store; then they ordered the presses stopped, as they wished to make some changes, and the changes have been made. Those changes may have been of more than one cut, but as I understood it, it was one cut.

By Mr. LEWINSON:

Q. That is the best of your knowledge?
A. Yes, sir.

Q. And excepting for one cut, so far as you know, the issues were all alike?

A. That is right.

Q. The magazine, after it was printed, was disposed of according to the instructions of the defendant, wasn't it?

A. It was.

Q. And you exercised no ownership over it except as the agent of the defendant?

A. As the agent of the defendant.

Q. You did not sell any?

A. I did not.

Q. You did not deal in them at all?

A. No, sir.

38 Q. You handled them as you were told to handle them by "Outing"?

A. Yes, sir.

Q. You were asked to bring such records as your business shows, stating the number of copies of this issue that were printed for and delivered into the possession of the defendant. Have you brought that record?

A. I decline to answer that question on the same grounds.

The COURT: You can answer the question whether you have brought the record or not.

A. I have.

Q. Have you the record with you?

A. I have.

First exception.—That the attorney for the plaintiff then asked the witness, Richard R. Ridge, the following question:

"Q. How many copies of that issue did you print for and deliver to 'Outing'?"

Mr. Abney, defendant's counsel, then objected to said question as follows:

"My objections to it are:

First. That the witness cannot be made to incriminate himself, and he objects to answer the question."

Which first objection the court overruled. Mr. Abney, defendant's counsel, then made the further objection to the question as follows:

"Second. That the question is immaterial, irrelevant and incompetent, inasmuch as the law requires that the copies found in the possession of the defendant shall be the measure of the penalty, and not the copies which they published."

39 The court thereupon sustained said second objection and excluded said question; to which ruling of the court counsel for plaintiff duly excepted.

Second exception.—The counsel for plaintiff then asked the witness, Richard R. Ridge, the following question:

"Q. How many copies of that issue did you deliver into the possession of the defendant?"

Mr. Abney, attorney for defendant, then objected to said question as follows:

"My objections to the question are:

First. That the witness cannot be made to incriminate himself, and he objects to answer the question."

Which first objection the court overruled.

Mr. Abney, defendant's counsel, then made the further objection to the question as follows:

"Second. That the question is immaterial, irrelevant and incompetent, inasmuch as the law requires that the copies found in the possession of the defendant shall be the measure of the penalty, and not the copies which they published."

The court thereupon sustained said second objection and excluded the said question; to which ruling of the court the plaintiff duly excepted.

Exhibit D, for identification, being a copy of the issue of November, 1893, of the magazine known as *Outing*, is offered and marked in evidence. The original exhibit was deposited with the clerk of this court for production on the hearing upon the writ of error and this bill of exceptions herein, the same to be treated as a model exhibit.

40 Third exception.—Henry Dexter, president of the American News Company, called and sworn to testify in behalf of the plaintiff, is asked by plaintiff's counsel:

"Q. How many copies of Exhibit D did you receive from the possession of the defendant for the purpose of sale and distribution on the defendant's behalf?"

The counsel for defendant thereupon objected to said question, and the court sustained said objection and excluded said question; to which ruling of the court the plaintiff duly excepted.

It was then, by stipulation between counsel for plaintiff and counsel for defendant, admitted that an employee of the plaintiff, on November 9, 1893, purchased of the defendant, in exchange for the sum of twenty-five cents, Exhibit D, and also that this action was begun on April 18, 1894, by the issuance of a summons on that date.

The plaintiff then rested.

Mr. ABNEY: "I move that your honor direct a verdict in favor of defendant, first, upon the ground that plaintiff has not shown that he is entitled to a copyright in this case on this photograph."

Which motion the court thereupon overruled.

Fourth exception.—Mr. Abney, counsel for defendant, thereupon moved that a verdict be directed in favor of defendant, as follows:

"I now move to direct a verdict in favor of the defendant, upon the ground that the statutory notice required was not given.

41 First. In that the stamp upon the photograph is not sufficiently plain as to be visible within the meaning of the statute."

Which motion was by the court, upon said first ground, overruled.

Mr. Abney then moved that a verdict be directed in favor of the defendant, as follows:

"Second. Upon the ground that the statutory notice required was not given, in that the statute requires that the stamp or copyright notice upon the photograph should be in the following form, viz., 'Copyright, 18—, by A B,' stating the year in full and the full name of the person who claims the copyright, while the stamp upon the photograph in question is in the following form, 'Copyright '93, by Bolles, Brooklyn,' which is not a sufficient notice under the statute, as the year should be given in full and the full name of the owner of the copyright."

Which motion the court denied, and exception taken to such ruling by the defendant.

The defendant thereupon rested.

Fifth exception.—The court thereupon directed a verdict in favor of the plaintiff as follows, to wit:

"The COURT: The testimony being now closed, in view of the recent decision of the circuit court of appeals in this case, there seems to be nothing to do except to direct a verdict in favor of the plaintiff for the single copy which is proved to have been found in possession of the defendant.

A verdict is thereupon directed in favor of the plaintiff for the sum of one dollar."

To which direction the defendant excepted.

42 Sixth exception.—The jury thereupon rendered a verdict in favor of the plaintiff, as directed by the court.

The plaintiff thereupon moved for a new trial on the ground that the court's refusal to permit the plaintiff to prove the number of copies which had been in the defendant's actual physical possession at any time within two years previous to the commencement of this action is a prejudicial error.

The court thereupon denied said motion for a new trial; to which denial and ruling of the court the plaintiff duly excepted.

The foregoing bill of exceptions contains all the evidence produced and given upon the trial, together with the rulings of the court and the exceptions thereto.

And forasmuch as the facts aforesaid and the decisions of the court thereon, and the exceptions to such decisions, do not appear of record, the plaintiff prays that this, his bill of exceptions, may be allowed.

WELLS, WALDO & SNEDECKER,
Attorneys for the Plaintiff.

43 It is hereby stipulated and agreed that the foregoing bill of exceptions contains all the evidence and proofs produced and given upon the trial of this action, and that the same be settled and allowed as the bill of exceptions of the plaintiff herein.

JOHN R. ABNEY,
Attorney for Defendant.

The aforesaid bill of exceptions contains all of the evidence and proofs given and produced upon the trial of this action, and is by me allowed and settled as above.

E. H. LACOMBE,
Justice of the U. S. Circuit Court, Southern District of N. Y.

44 EXHIBIT B.

Librarian of Congress, Copyright Office, United States of America.

No. 37143, Y.

LIBRARY OF CONGRESS,
COPYRIGHT OFFICE, WASHINGTON.

To wit: Be it remembered, that on the 10th day of August, anno Domini 1893, Charles E. Bolles, of Brooklyn, N. Y., has deposited in this office the title of a photograph, the title or description of which is in the following words, to wit:

Vigilant No. 4.

The right whereof he claims as proprietor, in conformity with the laws of the United States respecting copyrights.

A. R. SPOFFORD,
Librarian of Congress.

EXHIBIT C.

Librarian of Congress, Copyright Office, United States of America.

LIBRARY OF CONGRESS, WASHINGTON, D. C.

I certify that two copies of a photograph, Vigilant No. 4, were deposited in this office by Charles E. Bolles on the 10th day of August, 1893.

Witness my hand and the seal of my office this 1st day of March, 1895.

A. R. SPOFFORD,
Librarian of Congress.

45 EXHIBIT No. 2 FOR IDENTIFICATION.

Chas. E. Bolles, 244 Fulton St., cor. Clark St., Brooklyn; makes a specialty of photographing yachts, under sail or steam, yacht interiors and groups.

(Cut.)

Nov. 1ST, 1893.

The Outing Co.

DEAR SIRS: In issuing your forthcoming book on the International yacht race, I have to request that you will not use for illustration in it any of my copyrighted photographs, without first obtaining my consent to such use; otherwise I shall have to hold you responsible under the copyright law.

Respectfully yours, CHAS. E. BOLLES.

Sent by registered mail Nov. 2nd.

46 EXHIBIT 3 FOR IDENTIFICATION.

(Cut.)

J. H. Worman, president; B. J. Worman, secretary.

According to our books, the average monthly sale of Outing at the present time is more than double that of the sale during the corresponding period last year.—PATRICK FARRELLY, *Manager American News Co.*

The Outing Company, Limited, New York and London.

Replying to yours of the ——.

239 FIFTH AVENUE, NEW YORK,
NEW YORK, *Nov. 3rd*, '93.

Mr. Chas. E. Bolles, 244 Fulton St., Brooklyn, N. Y.

DEAR SIR: We have your esteemed favor of the 1st of Nov. Mr. Steiglitz made a full-page illustration of *Vigilant* for the *Amateur Photographer*, and we supposed informed you this cut would be used in the *Amateur Photographer* and in *Outing*. If this is not agreeable to you, giving you due credit as a photographer in the forthcoming book, we shall be obliged to have Cozzens paint us a picture of *Vigilant* at once. We know of no other cuts of yours that we are likely to use. If, however, any of the cuts should be credited to you, we shall be very glad to see that such credit is given. To this end we shall take pleasure in sending you, if you so desire, a compiete set of our final page proofs, in order that this correction may be properly made.

Yours very truly, THE OUTING CO., LTD.
J. H. WORMAN.

47 EXHIBIT 4 FOR IDENTIFICATION.

Chas. E. Bolles, 244 Fulton St., cor. Clark St., Brooklyn; makes a specialty of photographing yachts, under sail or steam, yacht interiors and groups.

(Cut.)

Nov. 4, 1893.

Outing Co., J. H. Worman.

DEAR SIRS: Your publication of my copyrighted photograph of "Vigilant No. 4" in the current number of *Outing*, in the face of my instructions mailed you, that the photograph was to be used in the *Amateur Photographer* only, is a violation of the copyright law. I shall take immediate steps against you under that law unless you make satisfactory settlement with me at once.

Respectfully yours, CHAS. E. BOLLES.

Registered mail, Nov. 5, '93.

(Endorsed:) United States circuit court, southern dist. of N. Y. Charles E. Bolles *vs.* The Outing Company, Limited. Bill of exceptions. Wells, Waldo & Snedeker, attorneys for plaintiff, 34 Nassau street, Mutual Life building. Due and timely service of a copy of the within bill of exceptions and of the following notice is admitted. Dated New York, Apr. 21, 1897. Service ——. John R. Abney, att'y for Outing Co., Ltd. Please take notice that the within is a copy of the plaintiff's bill of exceptions in the within-entitled action. Dated New York city, Apr. 21, 1897. Yours, &c., Wells, Waldo & Snedeker, attorneys for pl'ff, 34 Nassau street, New York. To John R. Abney, Esq., attorney for def't. U. S. circuit court. Filed Apr. 21, 1897. John A. Shields, clerk.

48 Circuit Court of the United States for the Southern District of New York.

CHARLES E. BOLLES, Plaintiff, *against* THE OUTING COMPANY, LIMITED, Defendant. } At Law. Assignment of Errors.

The plaintiff in this action, in connection with his petition for a writ of error, makes the following assignment of errors, which he avers occurred upon the trial of the cause, to wit:

I. The court erred in the rejection of evidence offered by the plaintiff upon said trial, in the following instances, to wit:

(1.) In that the attorney for the plaintiff asked the witness Richard R. Ridge the following question:

"Q. How many copies of that issue did you print for and deliver to 'Outing'?"

The defendant's counsel then objected to said question as follows:

"My objection to it is, that it is immaterial, irrelevant and incompetent, inasmuch as the law requires that the copies found in the possession of the defendant shall be the measure of the penalty and not the copies which they published."

The court thereupon sustained said objection and excluded said question; to which ruling of the court the plaintiff duly excepted.

49 (2.) In that the counsel for plaintiff asked the witness Richard R. Ridge the following question:

"Q. How many copies of that issue did you deliver into the possession of the defendant?"

The defendant's counsel then objected to said question as follows:

"My objection to the question is that it is immaterial, irrelevant and incompetent, inasmuch as the law requires that the copies found in possession of the defendant shall be the measure of the penalty, and not the copies which they published."

The court thereupon sustained said objection and excluded said question; to which ruling of the court the plaintiff duly excepted.

(3.) In that the witness Henry Dexter, president of the American News Company, being called and sworn to testify in behalf of the plaintiff, was asked by plaintiff's counsel the following question:

"Q. How many copies of Exhibit D did you receive from the possession of the defendant, for the purpose of sale and distribution, on the defendant's behalf?"

The defendant's counsel thereupon objected to said question, and the court sustained said objection and excluded said question.

II. That the court erred in overruling the motion of the plaintiff for a new trial.

WELLS, WALDO & SNEDEKER,
Attorneys for Plaintiff.

G. E. WALDO, *Of Counsel.*

50 (Endorsed:) Circuit court of the U. S., southern dist. of N. Y. Charles E. Bolles *vs.* The Outing Company, Limited. Assignment of errors. Wells, Waldo & Snedeker, attorneys for plaintiff, 34 Nassau street, New York, Mutual Life building. U. S. circuit court. Filed Ap. 21, 1897. John A. Shields, clerk.

Circuit Court of the United States for the Southern District of New York.

CHARLES E. BOLLES, Plaintiff, *against* THE OUTING COMPANY, LIMITED, Defendant.	At Law. Petition for Writ of Error.

Now comes Charles E. Bolles, plaintiff herein, and says:

That on or about the 17th day of April, 189–, this court entered a judgment herein in favor of the defendant and against this plaintiff, in which judgment and the proceedings had prior thereunto in this case certain errors were committed, to the prejudice of this plaintiff, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore, this plaintiff prays that a writ of error may issue in this behalf to the United States circuit court of appeals for the second circuit, for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause,
51 duly authenticated, may be sent to the said circuit court of appeals.

WELLS, WALDO & SNEDEKER,
Attorneys for Plaintiff.

G. E. WALDO, *Of Counsel.*

(Endorsed:) Circuit court of the U. S., southern dist. of N. Y. Charles E. Bolles *vs.* The Outing Company, Limited. Petition for writ of error. Wells, Waldo & Snedeker, attorneys for plaintiff, 34 Nassau street, New York, Mutual Life building. U. S. circuit court, Filed Apr. 21, 1897. John A. Shields, clerk.

52 Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

CHARLES E. BOLLES, Plaintiff,
vs.
THE OUTING COMPANY, LIMITED, Defendant.
} Bond for Damages and Costs.

Know all men by these presents, that we, Edmond C. Browne, James Constable, of 194 Fulton street, Brooklyn, of 246 Fulton street, Brooklyn, are held and firmly bound unto the above-named defendant in the sum of two hundred and fifty ($250) dollars, to be paid to the said The Outing Company, Limited; for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated the sixteenth day of April, in the year of our Lord one thousand eight hundred and ninety-seven.

Whereas the above-named plaintiff, Charles E. Bolles, has prosecuted a writ of error to the United States circuit court of appeals for the second circuit, for the correction of errors in the judgment entered herein and the proceedings had prior thereunto, and to reverse the judgment rendered in the above-entitled suit by the judge of the circuit court of the United States for the southern district of New York:

53 *Now, therefore*, the condition of this obligation is such, that if the above-named Charles E. Bolles shall prosecute his said writ of error to effect and answer all damages and costs if he fail to make said writ of error good, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

EDMOND C. BROWNE. [L. S.]
JAMES CONSTABLE. [L. S.]

Sealed and delivered and taken and acknowledged, this 16th day — April, 1897, before me—

C. B. GRAHAM,
Notary Public, Kings Co.

Certificate filed in New York Co.

STATE OF NEW YORK, } *ss:*
County of Kings, }

James Constable, being duly sworn, doth depose and say, that he is a resident and a householder within the State of New York, and that he is worth the sum of five hundred ($500) dollars, over and above all his just debts and liabilities, which he owes or has incurred, and exclusive of property exempt by law from levy and sale under execution.

JAMES CONSTABLE.

Sworn to this 16th day of April, A. D. 1897, before me—

C. B. GRAHAM,
Notary Public, Kings Co.

54 STATE OF NEW YORK, } ss:
County of Kings, }

Edmond C. Browne, being duly sworn, doth depose and say, that he is a resident and a householder within the State of New York, and that he is worth the sum of five hundred ($500) dollars, over and above all his just debts and liabilities, which he owes or has incurred, and exclusive of property exempt by law from levy and sale under execution.

EDMOND C. BROWNE.

Sworn to this 16th day of April, 1897, before me—
C. B. GRAHAM,
Notary Public, Kings Co.

(Endorsed:) U. S. circuit court, southern dist. of N. Y. Charles E. Bolles *vs.* The Outing Company, Limited. Bond for damages and costs. Wells, Waldo and Snedeker, attorneys for plaintiff, 34 Nassau street, New York, Mutual Life building. Approved as to form and sufficiency of sureties April —, 1897. U. S. circuit court. Filed April 21, 1897. John A. Shields, clerk.

55 UNITED STATES OF AMERICA, *ss:*

To the Outing Company, Limited, Greeting:

You are hereby cited and admonished to be and appear at the United States circuit court of appeals, to be holden at New York, on the 26 day of April, eighteen hundred and ninety-seven, pursuant to a writ of error, filed in the clerk's office of the circuit court of the United States for the southern district of New York, wherein Charles E. Bolles is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Dated Apr. 21, 1897.

E. H. LACOMBE,
U. S. Circuit Court Judge.

(Endorsed:) U. S. circuit court. Charles E. Bolles, pl'ff in error, *vs.* The Outing Company, Limited, def't in error. Citation. Wells, Waldo & Snedeker, attorneys for plaintiff, 34 Nassau street, New York, Mutual Life building. Due and timely service of the within citation in error is admitted. Dated New York, December 26th, 1895. John R. Abney, att'y for The Outing Co., Limited, defendant in error. U. S. circuit court. Filed Apr. 21, 1897. John A. Shields, clerk.

MEMORANDUM DECISION, APRIL 28, 1898.—"Judgment affirmed on opinion filed on former decision."

56 At a stated term of the U. S. circuit court of appeals for the second circuit, held at the court-room thereof, at the post-office, in the city of New York, on the 3rd day of May, 1897.

Present: Hon. William J. Wallace, Hon. Nathaniel Shipman, Hon. E. H. Lacombe, JJ.

CHARLES E. BOLLES, Plaintiff in Error,
against
THE OUTING COMPANY, LIMITED, Defendant in Error.

The above-entitled action having been duly brought on for argument upon the writ of error sued out of this court on the twenty-first day of April, 1897, by the plaintiff herein to review the judgment entered in the office of the clerk of the United States circuit court for the southern district of New York on the 17th day of April, 1897, in favor of the plaintiff, Charles E. Bolles, and against the defendant, The Outing Company, Limited, for the sum of one dollar and costs, amounting in all to the sum of sixty-four and thirty-five one-hundredths dollars ($64.35), and after hearing B. Lewinson, Esq., of counsel for the plaintiff in error, and John R. Abney, Esq., attorney and counsel for the defendant in error, and due deliberation having been had:

57 Now, on motion of John R. Abney, Esq., attorney and counsel for the defendant in error, it is—

Ordered, adjudged, and decreed that the said judgment be, and the same hereby is, in all things affirmed, with costs to the defendant in error, and that a mandate issue to the court below.

(Endorsed:) U. S. circuit court of appeals, second circuit. Charles E. Bolles, pl'ff, against The Outing Company, Limited, def't. Original order and notice of settlement. John R. Abney, attorney for def't, 2 Wall street, New York city. U. S. circuit court of appeals, second circuit. Filed May 4, 1897. James C. Reed, clerk. To Wells, Waldo & Snedeker, att'ys for plaintiff in error. Due and timely service of a copy of the within order and notice is hereby admitted. Dated New York, April 28, 1897.

58 Supreme Court of the United States.

CHARLES E. BOLLES, Plaintiff in Error,
against
THE OUTING COMPANY, LIMITED, Defendant in Error. } At Law. Assignment of Errors.

And now comes the said Charles E. Bolles, the plaintiff in error, by Wells, Waldo & Snedeker, his attorneys, and in connection with his petition for a writ of error makes the following assignment of errors, and says that in the record and proceedings in the above-entitled action there is manifest error, in this, to wit:

I. The court erred in the rejection of evidence offered by the plaintiff upon the trial in the following instances, to wit:

(1.) In that the counsel for the plaintiff asked the witness Richard R. Ridge the following question:

"Q. How many copies of that issue did you print for and deliver to 'Outing'?"

The defendant's counsel then objected to said question as follows:

"My objection to it is that it is immaterial, irrelevant, and incompetent, inasmuch as the law requires that the copies found in the possession of the defendant shall be the measure of the penalty, and not the copies which they published."

The court thereupon sustained said objection and excluded
59 said question; to which ruling of the court the plaintiff duly excepted.

(2.) In that the counsel for plaintiff asked the witness Richard R. Ridge the following question:

"Q. How many copies of that issue did you deliver into the possession of the defendant?"

The defendant's counsel then objected to said question as follows:

"My objection to the question is that it is immaterial, irrelevant, and incompetent, inasmuch as the law requires that the copies found in possession of the defendant shall be the measure of the penalty, and not the copies which they published."

The court thereupon sustained said objection and excluded said question; to which ruling of the court the plaintiff duly excepted.

(3.) In that the witness Henry Dexter, president of the American News Company, being called and sworn to testify in behalf of the plaintiff, was asked by plaintiff's counsel the following question:

"Q. How many copies of Exhibit D did you receive from the possession of the defendant for the purpose of sale and distribution on the defendant's behalf?"

The defendant's counsel thereupon objected to said question, and the court sustained said objection and excluded said question.

II. That the court erred:

(4.) In overruling the motion of the plaintiff for a new trial.

III. The plaintiff in error assigns the following errors committed by the circuit court of appeals for the second circuit in render-
60 ing its judgment of affirmance, to wit:

(5.) The said circuit court of appeals erred in affirming the said judgment of the circuit court for the southern district of New York.

(6.) The said circuit court of appeals erred in ruling that the circuit court did not err in the rejection of evidence offered by the plaintiff upon said trial, as stated in the first assignment of error hereinbefore set forth.

(7.) That the said circuit court of appeals erred in ruling that the said circuit court did not err in the rejection of evidence offered by the plaintiff upon said trial, as stated in the second assignment of error hereinbefore set forth.

(8.) That the said circuit court of appeals erred in ruling that the said circuit court did not err in the rejection of evidence offered by the plaintiff upon said trial, as stated in the third assignment of error hereinabove set forth.

(9.) That the said circuit court of appeals erred in ruling that the said circuit court did not err in refusing to permit the plaintiff to prove the number of copies of Exhibit D which had been in the defendant's actual physical possession at any time within two years previous to the commencement of this action.

(10.) That the said circuit court of appeals erred in ruling that the said circuit court did not err in overruling the motion of the plaintiff for a new trial.

WELLS, WALDO & SNEDEKER,
Attorneys for Plaintiff in Error.

G. E. WALDO, *Of Counsel.*

Endorsed: Supreme Court of the United States. Charles E. Bolles, plaintiff, against The Outing Co., Ltd., defendant. Original assignment of errors. Wells, Waldo & Snedeker, attorneys for plaintiff, 34 Nassau St., New York. United States circuit court of appeals, second circuit. Filed Mar. 7, 1898. William Parkin, clerk.

61 Supreme Court of the United States.

CHARLES E. BOLLES, Plaintiff,
against
THE OUTING COMPANY, LIMITED, Defendant. } Petition for Writ of Error.

The petitioner, Charles E. Bolles, states that there is pending in the United States circuit court for the southern district of New York as action at law for penalties, under sections 4952 and 4965 of the Revised Statutes of the United States and amendments thereof, for violation of defendant's copyright of a certain photograph of a certain ship or sloop yacht, known by the name of "Vigilant," wherein the petitioner herein is plaintiff and the said "The Outing Company, Limited," is defendant.

I. That the said plaintiff, in his complaint filed in said action May 22nd, 1894, demanded judgment against said defendant appropriate to the facts set up in the complaint and for relief accordingly, with costs.

II. That said action was tried in the said circuit court for the southern district of New York on the 5th day of April, 1897, and by direction of the court the verdict rendered in favor of the plaintiff and against the defendant for the sum of $1.00, and on the 17th day of April, 1897, judgment was entered for said sum and for costs, amounting to $64.35.

III. That thereafter and on the 21st day of April, 1897, the
62 said plaintiff, petitioner and plaintiff in error herein, obtained from the United States circuit court of appeals for the second circuit a writ of error for the review of said judgment and proceedings by the said circuit court of appeals.

IV. That thereafter and to wit, on the 21st day of April, 1897, the said plaintiff in error gave, in said action, a supersedeas bond; which bond was duly proved and filed in said action.

V. That the transcript of the record in the said action was duly made up by the clerk of the circuit court for the southern district of New York, and was filed in the clerk's office of said circuit court of appeals on April 21st, 1897.

VI. That said cause was heard by the said circuit court of appeals, and on the 3rd day of May, 1897, judgment was rendered therein by said circuit court of appeals affirming said judgment of said circuit court for the southern district of New York and directing its mandate to issue in said case.

VII. That the petitioner, the plaintiff in error herein, is aggrieved by the judgment of the said circuit court for the southern district of New York and by the judgment of affirmance and for mandate by said United States court of appeals for the second circuit.

Wherefore your petitioner, the plaintiff in error, prays that a writ of error may issue in his behalf to the United States circuit court of appeals for the second circuit for the review by the United States Supreme Court of said judgment of the circuit court of
63 appeals and of the judgment of the circuit court for the southern district of New York, and for the correction of the errors so complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the said circuit court of appeals.

WELLS, WALDO & SNEDEKER,
Attorneys for Plaintiff.

G. E. WALDO, *Of Counsel.*

Endorsed: Supreme Court of the United States. Charles E. Bolles, against The Outing Company, Ltd. Original petition for writ of error. Wells, Waldo & Snedeker, attorneys for plaintiff, 34 Nassau street, New York. United States circuit court of appeals, second circuit. Filed Mar. 7, 1898. Wm. Parkin, clerk.

64 Supreme Court of the United States.

CHARLES E. BOLLES, Plaintiff in Error, *against* THE OUTING COMPANY, LIMITED, Defendant in Error. } Order for Writ of Error.

On reading and filing petition of said plaintiff in error—

It is ordered that the said plaintiff in error execute to said defendant in error a bond, with two sureties, in the sum of five hundred dollars, conditioned that said plaintiff in error shall prosecute his writ of error to effect and if he fail to make his plea good shall answer all damages and costs, and upon the approval of said bond by a justice of this court within the time required by law and the service of said writ within the time required by law all process upon the judgment of said circuit court of appeals and upon the judgment of the United States circuit court for the southern district of New York be stayed during the pendency of said writ.

Dated Feb. 28, 1898.

R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

Endorsed: Supreme Court of the United States. Charles E. Bolles, plaintiff, *vs.* The Outing Co., defendant. Original order granting writ of error and fixing the amount of bond. Wells, Waldo & Snedeker, attorneys for plaintiff, 34 Nassau St., city. United States circuit court of appeals, second circuit. Filed Mar. 7, 1897. William Parkin, clerk.

65 Know all men by these presents that we, Charles E. Bolles, of No. 244 Fulton street, Brooklyn, N. Y., as principal, and George F. Van Doorn, of No. 346 Macon street, Brooklyn, N. Y., and —— ——, as sureties, are held and firmly bound unto The Outing Company, Limited, in the full and just sum of five hundred ($500.00) dollars, to be paid to the said The Outing Company, Limited, its certain attorney, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this — day of ——, in the year of our Lord one thousand eight hundred and ninety-seven.

Whereas lately, at a stated term of the United States circuit court of appeals for the second circuit, in a suit depending in said court between said Charles E. Bolles, plaintiff in error, and the said The Outing Company, Limited, defendant in error, a decree was rendered against the said Charles E. Bolles, plaintiff in error, on the third day of May, 1897, affirming the judgment of the circuit court for the southern district of New York, rendered April 17, 1897, and the said Charles E. Bolles, having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the said decree in the aforesaid suit, and a citation directed to the said The Outing Company, Limited, citing and admonishing it to be and appear at a Supreme Court of the United States, at Washington, within — days from the date thereof:

Now, the condition of the above obligation is such that if the said Charles E. Bolles shall prosecute said writ of error to effect and answer all damages and costs if he fail to make his plea good, then the above obligation to be void; else to remain in full force and virtue.

CHAS. E. BOLLES. [SEAL.]
GEO. F. VAN DOORN. [SEAL.]
F. H. CHANDLER. [SEAL.]

Sealed and delivered in presence of—
C. B. GRAHAM.
C. B. GRAHAM.
C. B. GRAHAM.

Approved by—
R. W. PECKHAM,
Asso. Justice of the Supreme Court of the United States.

February 28, 1898.

Copy.

66 UNITED STATES OF AMERICA, *ss:*

To the Outing Company, Limited, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the circuit court of appeals for the second circuit, wherein Charles E. Bolles is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Rufus W. Peckham, associate justice of the Supreme Court of the United States, this 28th day of Feb'y, in the year of our Lord one thousand eight hundred and ninety-eight.

R. W. PECKHAM,
Associate Justice of the Supreme Court of the United States.

67 Due and timely service of a copy of the within citation is hereby admitted this 7th day of March, 1898.

JOHN. R. ABNEY,
Att'y for the Outing Co. (Ltd.).

[Endorsed:] United States circuit court of appeals, second circuit. Filed Mar. 7, 1898. William Parkin, clerk.

68 UNITED STATES OF AMERICA, } *ss:*
Southern District of New York, }

I, William Parkin, clerk of the United States circuit court of appeals for the second circuit, do hereby certify that the foregoing pages, numbered from 1 to 66, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of Charles E. Bolles, plaintiff in error, against The Outing Company, Limited, defendant in error, as the same remain of record and on file in my office.

Seal United States Circuit Court of Appeals, Second Circuit.

In testimony whereof I have caused the seal of the said court to be hereunto affixed, at the city of New York, in the southern district of New York, in the second circuit, this 8th day of March, in the year of our Lord one thousand eight hundred and ninety-eight, and of the Independence of the said United States the one hundred and twenty-second.

WM. PARKIN, *Clerk.*

69 United States Circuit Court of Appeals for the Second Circuit, October Term, 1896.

Submitted December 7, 1896; decided January 13, 1897.

CHARLES E. BOLLES, Plaintiff in Error,
vs.
THE OUTING COMPANY (LIMITED), Defendant in Error. } No. 16.

In error to the circuit court of the United States for the southern district of New York.

Before Judges Wallace and Shipman.

WALLACE, *Circuit Judge:*

Upon this writ of error brought by the plaintiff in the court below to review a judgment for the defendant, error is assigned of the rulings of the trial judge in excluding evidence offered by the plaintiff, and in instructing the jury to find a verdict for the defendant. The action was brought under section 4965 of the U. S. Revised Statutes to recover penalties for the violation of a copyrighted photograph. The defendant was the proprietor of "The Outing," a monthly magazine published at the city of New York. The complaint alleges that the defendant printed in said magazine and sold without the plaintiff's consent forty thousand copies of the photograph, whereby there accrued to the plaintiff pursuant to the statute penalties in the sum of $40,000. Upon the trial it was shown that the defendant's magazine was printed by the Fless & Ridge Printing Company, a concern employed by the defendant to do its printing. The plaintiff offered to prove by a witness the number

70 of copies of the issue containing the photograph which were printed by the Fless & Ridge Company and delivered into the possession of the defendant. The evidence was objected to upon the ground of its incompetency, the statute making the copies found in the possession of the defendant the measure of the penalty, and not the copies published by it. The objection was sustained and the plaintiff duly excepted.

The statute declares that if "any person, after the recording of the title of any * * * photograph, * * * as provided in this chapter, shall, within the term limited, and without the consent of the proprietor of the copyright, first obtained in writing, * * * copy, print, publish or import, * * * with intent to evade the law, or knowing the same to be so printed, published or imported shall sell or expose to sale any copy * * * he shall forfeit to the proprietor all the plates on which the same shall be copied, and every sheet thereof, either copied or printed, and shall further forfeit $1 for every sheet of the same found in his possession, either printing, printed, copied, published, imported, or exposed for sale."

The statute has frequently been considered in the Federal courts. In *Dwight vs. Appleton* (1 *N. Y. Leg. Obs.* 195) it was decided that the jury were authorized to give the statutory penalty "for every sheet contained in the volume *found at any time*, within the period stated in the declaration, to have been in the possession of the de-

fendant." In *Millett vs. Snowden* (1 *West L. J.* 240) the court ruled that if the jury found that the defendant had republished the copyrighted matter without leave obtained in writing of the plaintiff, they must then "proceed to ascertain the number of sheets proved to have *been sold or offered for sale*, and return a verdict of one dollar for each sheet so sold or offered to be sold." In *Reed vs. Carusi* (*Campbell's Rep.* 72) the jury were charged by Chief Justice Taney that if they found the defendant liable, they should "find the number of copies caused to be printed for sale by him, within two years before the suit was brought." Apparently in the two cases last mentioned no point was made that the copies printed had
71 not actually been in the defendant's possession. In *Backus vs. Gould* (7 *How.* 708) the question was before the Supreme Court. In that case, although there was evidence that the defendant had published certain sheets of copyrighted matter, there was no evidence whether or not they had ever been found in his possession, and the court below instructed the jury that the plaintiffs were entitled to recover for every sheet of such matter which he had published, or procured to be published, whether the same were proved to have been found in his possession or not. It was argued that the court below totally disregarded the effect of the words, "found in his possession," and the Supreme Court sustained that contention, stating that "the penalty on each sheet, whether printed or being printed, or published, or exposed to sale, is limited to the sheets in the possession of the defendant," and reversed the judgment.

Since the adjudication in *Backus vs. Gould* it has always been held by the trial courts that the penalty only attaches upon the number of sheets found in the possession of the defendant; but there has been some diversity of opinion whether it was necessary to prove that the sheets had been actually discovered in the possession of the defendant previously to the commencement of the action, or whether it was enough if the evidence authorized a finding that they had been in his possession prior to the bringing of the action.

In *Thornton vs. Schreiber* (124 *U. S.* 612) the statute was before the Supreme Court in a case where the evidence was that a large number of sheets of the copyrighted photograph, published without the consent of the plaintiff, had been found in the store of Sharpless & Sons, in which the defendant was employed in the character of a business manager. Evidence was given showing that Thornton conceived the idea of using the photographs in the business of Sharpless & Sons, and ordered the copies to be made. The court held that upon those facts the court below erred in instructing the jury that the photographs were to be regarded
72 as in the possession of Thornton, saying, "We do not see how Mr. Thornton, merely as an employé, although he may have had a principal place in that establishment, could be said to have had the possession of these prints when they were found by the plaintiff in the store of Sharpless & Sons." It was contended in the case that the words "found in his possession" should be construed as "referring to the finding of the jury," and that the ex-

pression merely meant that where the sheets are ascertained by the finding of the jury to have been at any time in the possession of the person who committed the wrongful act such person is liable to the penalty. Referring to this contention the court said: "We however think that the word 'found' means that there must be a time before the cause of action accrues at which they are found in the possession of the defendant." The observation can only be read as intended to reject the construction contended for, and as expressing the view of the court that it is not enough to show that the sheets have been in the possession of the defendant, but it must be shown that they were actually found there. As the point was not necessary to the decision of the case the observation, strictly speaking, was obiter; but the precise point was presented for consideration, and was considered, and the observation must be accepted as the deliberate opinion of the court.

We are of the opinion that the section means to affix the penalty only when the sheets are shown to have been discovered or detected in the possession of the defendant prior to the bringing of the suit. The statute is apparently framed to give the party whose copyright has been invaded complete relief by an action in which he can procure a condemnation of the infringing sheets, and at the same time recover by way of compensation a penalty for every sheet which he is entitled to condemn. The words, "found in his possession," aptly refer to a finding for the purposes of forfeiture and condemnation. The remedy by condemnation and forfeiture is only appropriate in a case where the property can be seized upon process, and where as here the forfeiture declared is against property of the "offender" is only appropriate when it can be seized in his
73 hands. The section contemplates two remedies enforcible in a single suit each of which depends upon the same state of facts. The aggrieved party may at his election pursue either one or both remedies. But it does not contemplate a recovery of penalties except in respect to the sheets which can be condemned. We regret to feel constrained to place such a narrow interpretation upon the statute, but it cannot be given a more liberal one consistently with the language used. We conclude that the evidence was correctly excluded.

The trial judge directed a verdict for the defendant upon the ground that the plaintiff had not complied with the requirements of section 4962 of the United States Revised Statutes. That section provides that no person shall maintain an action for the infringement of his copyright in a photograph unless he shall have given notice of his copyright by inscribing upon the face or front of the copies of every edition published the words "Entered according to act of Congress in the year —— by A B in the office of the Librarian of Congress, at Washington." The notice upon the plaintiff's copies was as follows: "Copyright 93, by Bolles, Brooklyn." The trial judge ruled this notice to be defective because it omitted to give the first name or initials of the plaintiff, or to state the year the copyright was entered.

The first objection to the sufficiency of the notice is met by the

case of *Lithographic Co. vs. Sarony* (111 *U. S.* 53). In that case, the court after observing in its opinion that "the object of the statute is to give notice of the copyright to the public by placing upon each copy, in some visible shape, the name of the author, the existence of the claim of an exclusive right, and the date at which this right was obtained," held that a notice as follows, "Copyright, 1882, by N. Sarony" was a sufficient compliance. The court said: "It clearly shows that a copyright is asserted, the date of which is 1882, and if the name Sarony alone was used it would be a sufficient designation of the author until it is shown that there is some other Sarony. When, in addition to this, the initial letter of
74 the Christian name, Napoleon, is also given, the notice is complete." The general rule is that in legal proceedings, and in notices prescribed by law, the full name of a party must be given for the purposes of identification, and a designation by the initial letter or letters of the Christian name will not suffice. In the *Sarony* case the court regarded the use of the initial as superfluous, and the use of the surname as sufficient, when it did not appear that the public were likely to be misled by the omission of the full name. In the present case the notice not only gave the author's surname but also his residence; and it appeared by the evidence that the city of his residence was also his place of business, and it did not appear that there was any photographer there or elsewhere of the name of Bolles.

The second objection to the notice seems to be less substantial than the first. Concededly if it had read 1893 instead of 93 the notice would have been sufficient. Could any person possibly be misled by the omission of the figures denoting the century? Photographs are a production of the present century, and no one would imagine that the figures 93 meant 1793 or any earlier time. Manifestly they could not denote 1993 or a future time because they are the statement of an antecedent date, the time when the copyright was recorded in the office of the Librarian of Congress.

We conclude therefore that the trial judge erred in ruling that the notice was invalid and in directing a verdict for the defendant upon that ground.

It has been urged in behalf of the defendant in error that if the ruling of the court below proceeded upon erroneous reasons nevertheless the judgment should be affirmed because no original intellectual conception was involved in the production of the original photograph, and also because the notice inscribed upon the copies was so carelessly and inadequately printed as not to be visible to the eye. Whether a photograph is a mere manual reproduction of subject-matter, or an original work of art, is a question of fact; and there is certainly sufficient evidence in the present record to
75 justify if not to compel the conclusion that the one in question embodies an exceptional degree of artistic conception and expression. It required the photographer to select and utilize the best effects of light, cloud, water and general surroundings and combine them under favorable conditions for depicting vividly and accurately the view of a yacht under sail. Whether the notice was

legibly inscribed upon the copies was also a question of fact for the jury.

The judgment is reversed.

George E. Waldo, for the plaintiff in error.
John R. Abney, for the defendant in error.

A true copy of opinion in first case, upon which the following memorandum was based in second case: "Judgment affirmed on opinion filed on former decision."

[Seal United States Circuit Court of Appeals, Second Circuit.]

WM. PARKIN, *Clerk*.

76 UNITED STATES OF AMERICA, *ss*:

The President of the United States to the honorable the judges of the United States circuit court of appeals for the second circuit, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said United States circuit court of appeals, before you or some of you, between Charles E. Bolles, plaintiff in error, and The Outing Company, Limited, defendant in error, a manifest error hath happened, to the great damage of the said Charles E. Bolles, plaintiff in error, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within 30 days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal of the Supreme Court of the United States.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 28th day of February, in the year of our Lord one thousand eight hundred and ninety-eight.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by—
R. W. PECKHAM,
Asso. Justice of the Supreme Court of the United States.

Washington, Feb'y 28, '98.

[Endorsed:] United States circuit court of appeals, second circuit. Filed Mar. 7, 1898. William Parkin, clerk.

Endorsed on cover: Case No. 16,817. U. S. C. C. of appeals, 2nd circuit. Term No., 604. Charles E. Bolles, plaintiff in error, *vs.* The Outing Company (Limited). Filed March 11, 1898.

6—604

Supreme Court of the United States.

OCTOBER TERM—1899.

CHARLES E. BOLLES,
Plaintiff in Error,

vs.

THE OUTING COMPANY, LIMITED,
Defendant in Error.

Brief of Plaintiff in Error.

In Error to the United States Circuit Court of Appeals for the Second Circuit.

Action for penalties for infringement of Copyright of Photograph under Section 4965 U. S. R. S.

Statement of Facts.

The plaintiff in error, Charles E. Bolles, a citizen and resident of the city (now Borough) of Brooklyn, in the State of New York, is a photographer, now, and for many years, carrying on business in Brooklyn, and making a specialty of photographing yachts and ships.

The defendant in error, The *Outing* Company, Limited, a New York corporation, carrying on business in the City of New York, is the publisher of a monthly magazine known by the name of *Outing*.

In August, 1893, the plaintiff in error made a

photograph of the yacht *Vigilant*, within the Southern and Eastern District of New York, and copyrighted the same under the title, "*Vigilant* No. 4."

The defendant in error had a photogravure made of the photograph, and published it in its magazine of November, 1893.

The copyright stamp on the photograph was made by the impression at the lower right-hand corner of the photographs of the words "Copyright 93, by Bolles, Brooklyn." "Bolles" was the trade mark name used by the plaintiff in error. (Record, p. 19).

The defendant in error had no permission, either printed or verbal, to use the photograph.

One copy of the November, 1893, *Outing* magazine was purchased of the defendant in error by an employee of the plaintiff in error, on November 9, 1893, for the sum of twenty-five cents. (Record, p. 23).

The action was begun on April 18, 1894. (Record, p. 2).

On the first trial the action was dismissed on the ground that the copyright stamp on the photograph, viz.: "Copyright 93, by Bolles, Brooklyn," was not a sufficient notice of copyright stamp under the statute, because the year was not given in full, and the full name of the owner was not given.

The plaintiff took the case on writ of error to the Circuit Court of Appeals upon exception to the dismissal and exception to the exclusion of the evidence offered as to the number of copies of the infringement found in the defendant's possession.

The Circuit Court of Appeals held that the copyright stamp was sufficient, and sent the case back for new trial, but sustained the trial Court in its exclusion of the evidence offered as to the number of copies found in possession of the defendant.

See opinion by Wallace, *J.*, Record, p, 37 to 39, and 77 Fed. 966.

On April 5, 1897, a new trial was had, the same evidence as to the number of copies of the infringement found in the possession of the defendant was excluded and a verdict directed for plaintiff for one dollar penalty for the one copy bought by plaintiff's employee from the defendant. (Record, p. 24).

The plaintiff moved for a new trial on the ground that the Court's refusal to permit plaintiff to prove the number of copies which had been in the defendant's actual physical possession at any time within two years previous to the commencement of this action is a prejudicial error (Record, p. 24), to which ruling plaintiff excepted.

Judgment for plaintiff was entered for one dollar and costs, April 17, 1897. (Record, p. 11).

The plaintiff again sued out writ of error to the Circuit Court of Appeals, which affirmed the judgment for one dollar and costs on its former opinion. (Record, fol.).

The errors assigned are: First, In the rejection of evidence offered by plaintiff as follows: In that the attorney for the plaintiff asked the witness, Richard R. Ridge, the following questions:

(1). Q. How many copies of that issue did you print for and deliver to "Outing?"

(2). Q. How many copies of that issue did you deliver into the possession of the defendant? and;

(3). In that the witness, Henry Dexter, President of the American News Company, being called and sworn to testify in behalf of the plaintiff, was asked by plaintiff's counsel the following question:

Q. How many copies of Exhibit D [November 1893 Outing Magazine] did you receive from the possession of the defendant, for the purpose of sale and distribution, on the defendant's behalf?

Which three questions were, on objection of the defendant, excluded, on the ground that the copies found in the possession of the defendant are the

measure of the penalties and not the copies published. Second, That the Court erred in overruling the motion of the plaintiff for a new trial (Record pp. 27 & 28).

In other words, that the Circuit Court erred in refusing to permit the plaintiff to prove the number of copies of Exhibit D which had been found in the defendant's actual physical possession at any time within two years previous to the commencement of this action, no matter by whom found, other than the plaintiff or his agent, and that the Circuit Court of Appeals erred in sustaining the ruling of the Circuit Court. (See Record pp. 31, 32 and 33).

POINTS.

I.

All statutes, penal and remedial, ought to be reasonably construed so as to effectuate the legislative intent.

Defendant in error quoted below authorities to the effect that this is a penal statute, and should be strictly csnstrued, and thereupon contends for a construction which would render the statute almost wholly nugatory and ineffective. The applicability of the rule as to strict construction is considered herein (Point II). Assuming for the purpose of the argument, however, that the statute is penal, it should nevertheless receive a reasonable construction effectuating the legislative intent.

Even in the case of felonies the Courts have adopted this principle and applied it in practice. On this point the decision of the Supreme Court in the lead-

ing case of Lacher *vs.* United States, 134 U. S., 624, is very much in point. The Court, speaking by Chief Justice FULLER, unanimously held: "As contended on behalf of the defendant there can be no constructive offences; and before a man can be punished his case must be unmistakably within the statute. But, though penal laws are to be construed strictly, yet the intention of the Legislature must govern in the construction of penal as well as other statutes; and they are not to be construed so strictly as to defeat the obvious intention of the Legislature."

U. S. *vs.* Wiltberger, 5 Wheat., 76.
U. S. *vs.* Morris, 14 Pet., 464.
Fur Co. *vs.* U. S., 2 Pet., 358, 367.

"It appears to me," said Mr. Justice STORY, in U. S. *vs.* Winn, 3 Sam., 209, 211, "that the proper course in all these cases is to search out and follow the true intent of the Legislature, and to adopt that sense of the words which harmonizes best with the context, and promotes in the fullest manner the apparent policy and objects of the Legislature." To the same effect is the statement of Mr. Sedgwick in his work on Statutory and Constitutional Law (2d Edition, 282): "The rules that statutes of this class are to be construed strictly is far from being a rigid and unbending one, or rather, it has in modern times been so modified and explained away as to mean little more than that penal provisions, like all others, are to be fairly construed according to the legislative intent as expressed in the enactment, the Courts refusing on the one hand to extend the punishment to cases which are not clearly embraced in them, and on the other, equally refusing, by any mere verbal nicety, forced construction or equitable interpretation, to exonerate parties plainly within their scope." This passage is quoted by Baron Bramwell, in Atty. Gen'l *vs.* Sillem, 2 Hurl, etc., 532, as

one " in which good sense, force and propriety of language are equally conspicuous, and which is amply borne out by the authorities, English and American, which he cites." And the reason for the less rigorous application for the rule is well given in Maxer. Int. St. (2d, Ed.), 318, thus: "The rule which requires that penal and some other statutes shall be construed strictly, was more rigorously applied in former times, when the number of capital offences was more than one hundred and sixty, or more; when it was still punishable with death to cut down a cherry tree in an orchard, or to be seen for a month in the company of gypsies. But it has lost much of its force and importance in recent times, since it has become more and more generally recognized that the paramount duty of the judicial interpreter is to put upon the language of the Legislature, honestly and faithfully, its plain and rational meaning, and to promote its object. It was founded, however, on the tenderness of the law for the rights of individuals, and on the sound principle that it is for the Legislature, not the Courts, to define a crime and ordain its punishment." And, looking into the evil in the mind of the Legislature, the character of the acts prohibited, the history of the act, and similar statutes remaining, and above all into the the reasonable intent of Congress, the Court proceeded to give effect to each line of R. S. 5,467 for embezzling letters, in spite of the fact that a line of connecting matter had been left out in the revision by repunctuating it, so that the penalty embraced all the prohibited acts enumerated in the statute.

This case has been repeatedly followed by the Supreme Court, and was cited as authority in the very recent case of Wiborg *vs.* U. S., 163 U. S., 632, 647.

II.

This statute is remedial as well as penal.

The authorities cited on behalf of plaintiff in error to this effect were *below* dismissed by defendant in error, because the Supreme Court said, in Backus *vs.* Gould, that as "this is a penal section, it must be construed strictly." No reference was made in that case on behalf of the plaintiff to the remedial element of the statute, and that point does not appear to have been considered by the Court, in that case. That the remedial element, even in penal statutes, should be considered by the Courts, has however, been repeatedly held since Bacus *vs.* Gould was decided by the Supreme Court.

In the much more recent case of Huntington *vs.* Attrill, 146 U. S., 657, the Court considered this whole question very carefully in an exhaustive opinion by Mr. Justice Gray, and limited and overruled many earlier cases tending to the contrary. The Court held (p. 666):

"In interpreting this maxim ('The Courts of no country execute the penal laws of another,') there is danger of being misled by the different shades of meaning allowed to the word 'penal' in our language. In the municipal law of England and America, the words 'penal' and 'penalty' have been used in various senses. Strictly and primarily, they denote punishment, whether corporal or pecuniary, imposed and enforced by a State for a crime or offense against its laws (U. S. *vs.* Reisinger, 128, U. S., 398 402; *vs.* U. S. Chanteau, 102 U. S., 603, 611). But they are also commonly used as including any extraordinary liability to which the law subjects a wrongdoer in favor of the person wronged, not limited to the damages suffered. * * * Penal laws, strictly and properlty, are those imposing punishment

for an offense committed against the State, and which, by the English and American Constitutions, the executive of the State has the power to pardon. Statutes giving a private action against the wrongdoer are sometimes spoken of as penal in their nature, but in such cases it has been pointed out that neither the liability imposed nor the remedy given is strictly penal. The action of an owner of property against the hundred to recover damages caused by a mob was said by Justice Willis and Butler to be 'penal against the hundred, but certainly remedial to the sufferer' (Hyde *vs.* Cogan, 2 Dong., 699, 705, 706). A statute giving the right to recover back money lost at gaming, and if the loser does not sue within a certain time, authorizing a *qui tam* action to be brought by any other person for threefold the amount, has been held to be remedial as to the loser, though penal as regards the suit by a common informer? * * * The test whether a law is penal, in the strict and primary sense, is whether the wrong sought to be redressed is a wrong to the public, or a wrong to the individual; according to the familiar classification of Blackstone: Wrongs are divisible into two sorts or species, private wrongs and public wrongs."

In the case of Stickwell *vs.* U. S., 13 Wall., 531, the Court emphasized the fact that statutes authorizing a recovery of a penalty are not properly penal, *where the penalty is awarded to the party injured*, although it does not strictly measure the degree of his damages. The statute in question was one of the revenue laws of the United States, and imposed a forfeiture of double the value of the goods (not of the duty) where goods were illegally imported into the United States. The Court held (p. 547): "It must, therefore, be considered as remedial, as providing indemnity for loss. And it is not the less so because the liability of the wrongdoer is measured by double the value of the goods received, concealed or purchased, instead of their single value. The act of ab-

stracting goods illegally imported, receiving, concealing or buying them, interposes difficulties in the way of a government seizure, and impairs, therefore, the value of the government right. It is, then, hardly accurate to say that the only loss the government can sustain from concealing the goods liable to seizure is their single value, or to assert that the liability imposed by the statute of double the value is arbitrary and without reference to indemnification. Double the value may not be more than complete indemnity. There are many cases in which a party injured is allowed to recover in a civil action double or treble damages. Suits for infringements of patents are instances, and in some States a plaintiff recovers double damages for cutting timber upon his land. It will hardly be claimed that these are penal actions requiring the application of different rules of evidence from those that prevail in other actions for indemnity."

A comparison of R. S,, 4963, which is a purely penal section, giving a remedy by *qui tam* action to a common informer, with the section here involved, affording a right of action for fixed statutory damages, varying with the degree of damage, one-half of which at least goes to the party damages, makes clear the difference between the character of these actions.

It is submitted that under the more recent and authoritative Supreme Court cases in question, the cases heretofore cited on behalf of plaintiff in error recognizing the at least partially remedial character of R. S. 4965, correctly express the law (see Brief, p. 5).

To the objection that the amount of the penalty may be greater than the damages in some cases, and less in others, it is a sufficient answer that Congress in its wisdom has nevertheless chosen to adopt that principle of fixed damages in its legislation. As amended, the damages may in many cases be inadequate, in view of the great value of some of the copyrights embraced in this section, *particularly in view*

of the difficulty in discovering and tracing infringements.

The history of copyright legislation shows that by means of the fostering protection furnished by the law, copyrights have at length in many cases become very valuable property. When that was accomplished, in the case of books, Congress (in 1870) recognized the fact and abolished the penalty provisions and furnished an action on the case for damages as a substitute.

In the case of the articles embraced by Sec. 4965 its recent amendments have recognized the fact that these copyrights have become valuable, and that, therefore, limitations on the penalties recoverable may be put without injury to the authors, whom the Constitution seeks to protect. In a subsequent stage of development doubtless the penalties will be absolutely abolished. But no one can fail to recognize the fact that without the original penalty provisions as to books, etc., literature would have been seriously retarded and authors forced to content themselves with a pittance as compensation for their labors.

The attitude of the Courts of our day is well expressed by the Court in Myers *vs.* Callaghan, 5 Fed. Rep., 726, 732: "I am not inclined to agree with the strict consruction which has been placed on the acts of Congress by some of the Courts. It seems to me, on the contrary, that *these various provisions of law in relation to copyright should have a liberal construction* in order to give effect to what may be considered the inherent right of the author to his own work."

Thus in Dwight *vs.* Appleton, 1 N. Y. Legal Obs., 195.

Thompsou, *J.*, says: "Though these acts are penal, yet they are remedial also, and made in favor

of the aggrieved party, and to secure his rights the forfeiture goes in part to him."

See also Myers *vs.* Callahan, 5 Fed. R., 726, 732.

III.

FOUND IN POSSESSION.

The statute contemplates a recovery of one dollar for every copy found by any one in defendant's possession within the period of the statute of limitations.

Whether the statute be regarded as penal or remedial, the question remains that the reasonable intent of the Legislature should be effectuated.

By Section 4952 the author, inventor, designer and proprietor is given the sole right of reprinting, copying and vending the copyrighted article. The presumption at once arises that there is some sanction in the law to preserve his rights and protect them. This is found as to books in Sec. 4964, as to dramatic compositions in 4966, as to the other copyright subjects in Section 4965. It will be noticed that this last section prohibits all persons without consent from engraving, etching, working, copying, printing, publishing, importing, varying the main design or knowingly selling or exposing for sale any unauthorized copy of the article. The prohibition, it will be noticed, includes selling, as well as exposing for sale, and printing and publishing. The whole section has for its purpose the imposition of penalties for doing the prohibited thing. Obviously the whole purpose of the statute would be frustrated as regards

the most aggravated and detrimental invasions of the author's rights, if past transactions are not embraced by the words "one dollar for every sheet of the same found in his possession." The statute (Sec. 4952) is certainly not less violated because the pirate has succeeded in disposing of the copies before the plaintiff detected him and could find the copies. The injury to the owner of the copyright is, of course, even greater where the infringements for value received have been spread broadcast, after they left defendant's possession. The mere unlawful possession of copies which were printed or published without authority, works no such injury to the owner of the copyright as does their accomplished dispersion, with its inevitable effect of depreciating, if not destroying, plaintiff's exclusive right to copy and sell. The only reference to time in its bearings on infringements while a copyright is in force is in Sec. 4968 (the Statute of Limitations).

No rational ground for any legislative intent to limit the language of the statute to copies personally found by the plaintiff himself, on some one occasion, in defendant's possession, can be suggested. It is submitted that the statutory language suggests no such limitation. The statute does not say that *the plaintiff personally* must have found the copies in defendant's possession. It does not say that there must have been one single occasion, and no more, when the copies were thus found. It does not say that such finding must have been just prior to the commencement of the action, not two months prior, for instance. No suggestion of any such intent appears anywhere in the statute. The uniform practice has been, as appears from the brief heretofore filed herein, to introduce testimony to show the number of copies found by different persons in the defendant's possession during the time stated in the complaint, and within the period of

limitation. All the circumstances as to the finding are competent to place before a jury. If a person saw the copies there, delivered them there, took them from there, he certainly FOUND them in the defendant's possession,

This is the view taken in Dwight *vs.* Appleton, 1 N. Y., Legal Obs., 195, 8 Fed. Cases, p. 183, by Justice Thompson; in Reed *vs.* Carusi, Campbell's Taney's Rep., 72, 20, Fed. Cases, p. 431, by Chief Justice Taney, and in Millett *vs.* Snowden, 1 West Law. J., 240, 17 Fed. Cases, p. 374, by Betts, J., as well as in the other cases under the statutes, reported or unreported, that have been discovered. It will be noticed that two of these three cases were decided in this district. To the same effect is the charge of Judge Shipman in Springer Litho. Co. *vs.* Falk, 59 F. R., 707, reported on appeal to this Court. It will be noticed that the evidence is fully presented in Dwight *vs.* Appleton, and was of the same character as the testimony excluded herein, and nothing inconsistent with this was decided by the Supreme Court in either Backus *vs.* Gould, 7 How., 798, or in Thornton *vs.* Schreiber, 124 U. S., 612.

In Johnson *vs.* Donaldson, 3 Fed. Rep., 22, the question was whether in an action for penalties, defendant could be compelled "by subpœna *duces tecum*, to produce his books of account, photographic plates and the copies of the printed chromos claimed to be in his possession, to be used as evidence for the plaintiff." Wallace, J., held that a decision at the trial on this point in defendant's favor was correct, as the defendant could not be obliged to testify against himself in an action for a penalty. The Court, as well as the parties, here assumed that the books of account might show how many copies HAD BEEN *in defendant's possession; for*, on the theory of defendant in

error, the whole matter would have been irrelevant.

It should also be noticed that the form of imposition of penalties and forfeitures for "articles found in defendant's possession" is an extremely common one, and is found in numerous other federal statutes. Compare, for instance, the 43d Section of the Customs Act of March 2, 1799," if any chest, etc., shall be found in the possession of any person, unaccompanied with such marks and certificates, it shall be presumptive evidence that the same is liable to forfeiture." No such difficulty as to the construction of this were encountered, the language having been given its natura import in

651 Chests of Tea *vs.* U. S., 1 Paine, 499.

U. S. *vs.* 350 Chests, 12 Wheaton, 486.

Similar language is used in R. S. 3069, 2797, 3257, 3258, etc., etc.

The language of R. S. 3258 has been repeatedly construed by the Courts. It provides that "every still or distilling apparatus not so registered, together with all personal property in the possession or under the control of such person and found in the building or in any yard or enclosure connected with the building in which the same may be set up, shall be forfeited."

This was construed in the cases of U. S. *vs.* Distillery, 11 Blatchf., 255, and U. S. *vs.* Stowell, 133, U. S., 1.

Under this statute the Supreme Court held in the Stowell case (p. 15) "Sec. 3258 does not forfeit any land or buildings. But it does forfeit every still or distilling apparatus not registered by the person having it in his possession or custody, or under his control; as well as all 'personal property in the possession or custody or under the control of such person

and found in the building or in any yard or enclosure connected with the building in which the same may be set up.' Personal property, by whomsoever owned, is thus included in the forfeiture, provided that it is in the possession, custody, or control of the distiller, as well as found upon the premises. There is no reason for giving a narrower construction to this enactment than to the second provision of Sec. 16 of the Act of 1875 above considered."

Again (p. 17): "The forfeiture under the first of these provisions of spirits and wines, stills and apparatus owned by the offender, is evidently intended to take effect immediately upon the commission of the offense, so as to prevent any subsequent alienation by him before seizure and condemnation, and the words 'wherever found' merely preclude all limit of place, and have no tendency to postpone the time when the forfeiture shall take effect. In the second provision the restriction to personal property 'found in the distillery' or upon the premises of which it is a part, is a limit of place only, and does not postpone the forfeiture of such property which is on the premises when the offense is committed."

On reason and authority the construction contended for by the defendant in error is untenable.

It is in this connection that the case of Ex. p. Beal, L. R., 3 Q. B. 387 quoted in plaintiff's brief (pp. 10, 11), is particularly applicable, for the Court says that "a different construction would result in an absurdity and defeat the intention of the Legislature. * * * The Legislature was dealing with an offense which was likely to be committed wholesale, and they have used words meaning that the sale of every copy should be an offense." So also the Lacher case is direct authority also on this point, to show that Congress must have intended that the penalty embraced all the acts prohibited in the section, including, therefore, copies sold and delivered which had been in defendant's possession.

The respondent rests his entire case, as he did at first instance, on the decision of the Supreme Court in the case of "Backus *vs.* Gould."

As with a sweep of the hand he brushes away every argument and every one of the numerous and pregnant citations of the appellant, without even attempting to criticise or distinguish them, with the sole argument (?) that they ante-date "Backus *vs.* Gould."

He fatuously ignores the fact that the Supreme Court, in not criticising or distinguishing the various authorities thus cited by the appellant, evidently considered them wholly consistent with the law declared in said case.

He clearly shows his utter misapprehension of the contention of the plaintiff in error, he seems to think the plaintiff in error has proceeded upon the theory that he could establish a case for an enormous amount of penalty by showing how many copies WERE PRINTED AND SOLD."

That contention, it is conceded, is bad law, AND WAS SO HELD BY THE SUPREME COURT IN "BACKUS *vs.* GOULD."

But that is precisely NOT the theory upon which the case was tried by the plaintiff in error, and is NOT the testimony, the exclusion of which is the basis of this appeal.

The error alleged and brought up for review is the exclusion by the Court below of the evidence of copies "*delivered into possession* of the defendant," and "immediately thereafter *taken out of defendant's possession;*" *i. e.*, evidence of copies which had actually been in defendant's own physical possession.

In "Backus *vs,* Gould" the only proof was of "copies SOLD by defendant." There was not one word of evidence in that case, that any of the copies so sold *had ever been in the* **DEFENDANT'S** *possession.*

THAT IS PRECISELY WHAT DISTINGUISHES THIS CASE FROM THE CASE OF "BACKUS *vs.* GOULD."

It has always been held that the plaintiff could show the number of copies he *personally* or by *his agent* had found in possession of the defendant.

The plaintiff in error here contends that he should have been permitted to show the number of copies found in the defendant's possession by any person save the defendant himself.

It is a fair, reasonable and just construction of the statute, and neither Backus *vs.* Gould, nor any other case, except that at the bar, holds to the contrary.

Any other construction would relieve from any liability for penalties every publisher of newspapers or magazines, no matter how culpable. For, in the nature of things, these infringements cannot be known to the party wronged until after the distribution of practically the entire issue. Such, surely, was not the intention of the legislature.

Moreover, how could any other interpretation be applied with any certainty? If it were required that copies must be actually found within the physical possession of the defendant, *when* must they be so found, and *by whom?* On the day that suit is brought, the day before, or a month or a year before? What would be plaintiff's rights as to copies seen by him in defendant's possession some time before suit was brought, as to which defendant proves that he no longer had them at the time of the issuance of the summons?

Must the plaintiff himself see them in the actual possession of the defendant, or would the requirements of such a construction of the statute be satisfied if they were so seen by a stranger who informs the plaintiff? And if defendant's actual possession of copies before suit brought may be proven by such informer, why not (*as was attempted in this case*) by the printer who delivered them into the defendant's hands?

It seems clear that the construction contended for by plaintiff is at once reasonable, clear and responsive to legislative intent; whereas the ruling of the Court below was illogical, strained, technical and unjust.

It is respectfully submitted that the judgment in this case should be reversed and a new trial granted to the plaintiff in error, with leave to show on that trial the number of copies of the infringing publication found by any person or persons in the defendant's possession within two years prior to the commencement of this action.

GEORGE E. WALDO,
Of Counsel for Plaintiff in Error,

No. 47.

Brief of Abney for

Filed Oct. 27, 1899.

Clerk Supreme Court U. S.
FILED
OCT 27 1899
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States,

OCTOBER TERM, 1897.

CHARLES E. BOLLES,
Plaintiff in Error,

v.

THE OUTING COMPANY, LIMITED,
Defendant in Error.

47

BRIEF SUBMITTED BY JOHN R. ABNEY, COUNSEL FOR DEFENDANT IN ERROR.

Statement.

The plaintiff in error sought at the trial to establish the proposition that by showing by the company's printer how many copies he printed for it, and by the American News Company how many copies it sold for defendant, the plaintiff in error could submit it to the jury to infer how many copies had been in the possession of defendant and the finding of the jury would be what is meant by "found in his possession" in the statute. This is the main point raised by plaintiff in error.

POINTS.

FIRST.

The Courts below properly construed the words of the statute, "found in his possession."

I.

In the case of Reed *v.* Carusi, from which the counsel for plaintiff in error quotes, I find no statement of the facts proved. It may have been that the plaintiff in that case actually found in the possession of that defendant the number of sheets alleged. The words of the act, "found in his possession," do not seem to have been the subject of construction in that case. The remarks of Chief Justice Taney, quoted by my opponents, seem to have been used in regard to the Statute of *Limitations*. It is therefore no authority for the admission of the evidence of the witness Ridge, which the Court rejected (Transcript, p. 22) and which forms the basis of alleged error No. 1 (p. 27).

But even if that case were in point, it would not be good authority now. It was a Circuit Court decision by Chief Justice Taney in 1845. Four years after that (in 1849), the meaning of the words "found in his possession" was fully discussed before the Supreme Court of the United States in the case of Backus *v.* Gould, 7 How., 798, and their meaning *settled*. In that case the defendant's counsel prayed the Court below, among other things, as follows: "9th. In regard to the amount "of the penalty to be recovered, the *defendant's* "*counsel* insisted that the *plaintiffs could only*

"*recover* fifty cents *for every sheet* of the matter "transferred from said index to first, second and "fifth volumes of Cowen's Reports, and second "volume of Wendell's to the said digest "of said defendant, *as had been proved to* "*have been found in his possession*, and "either printing or printed, published, "or exposed for sale, and that there was no legal "proof that any such sheets of said matter had "been so found in said defendant's possession, and "prayed the Court so to instruct the jury. But "the *counsel for plaintiffs* insisted that they "were entitled to recover fifty cents for every "sheet of such matter which *had been published*, "*or procured to be published*, by the defendant, "*whether the same were proved to have been* "*found in the defendant's possession or not*, and "*so the Court decided* and instructed the jury, and "*refused to instruct the jury as prayed by the* "*counsel for the defendant*, to which decision and "instruction, and refusal to instruct, the defend-"ant's counsel excepted" (See 7 How., 802). Upon such charge and instruction the jury found a verdict for the plaintiff in that case for $2,069.75 penalty. The Supreme Court considered the construction of the words "found in his possession" under the foregoing ninth prayer; and as the decision turned upon it, no other questions were considered (*Ib.*, p. 811). The argument of counsel is given on that point alone (*Ib.*, p. 802). I respectfully refer this Court to the full and able argument of Mr. James Bayard in that case, on the very point in question now. The Supreme Court reversed the decision below on the ninth prayer, and it used this language: "This *penalty* of fifty cents on "each sheet, whether printed, or published, or ex-

" posed to sale, *is limited to the sheets in posses-*
" *sion of the defendant.* But, under the instruc-
" tion of the Court, *a verdict* was rendered *for*
" *every sheet* which the *defendant had published*
" *or procured to be published.*"

Thus the question has not been an open one since that decision in 1849.

II.

Counsel for plaintiff in error indulge in some remarks as to the act being remedial, and then say: " In the light of these facts it is, therefore, obvious " that the ordinary principle of law, that penal " statutes are to be construed strictly, has little, if " any, application to this provision of the present " copyright law." But, in the above cited case of Backus *v.* Gould the Supreme Court said: "*As this is the penal section, it must be strictly construed.*"

In the face of that decision, the cases of Dwight *v.* Appleton, 1 N. Y. Legal Abs., 195; Meyers *v.* Calahan, 5 F. R., 726; Ferrett *v.* Atwell, 1 Blatch., 156; Taft *v.* Stephens Lith. & Eng. As., 38 F. R., 28, cited by my opponents, would not be authority, even if they were in point. But they are not in point at all. Nor is Stockwell *v.* U. S., 13 Wall., 531, which is also cited by my opponents.

III.

The case of Carter *v.* Young, 42 Superior Ct., 172, cited by my opponents, has no application; for it construed a civil statute to facilitate the service of process, not a penal statute, and is not in point any way. Nor are Rapalje's Law Dictionary, the Cen-

tury Dictionary, Sec. 2,333 U. S. Rev. Stats., Ivan Silver Mining Co. *v.* Mike and Horr Gold Mining Co., Tower *v.* Tower, 18 Pickering, 262, and 53 Mo., 208.

IV.

Dwight *v.* Appleton, 1 N. Y., Leg. Abs., 195, cited by plaintiff's counsel, was decided at Circuit in 1843, six years before Backus *v.* Gould.

Millett *v.* Snowdon, 1 West. L. J., 240, cited for plaintiff, is certainly not authority to sustain the contention that Ridge could be asked how many copies he had printed. It is the reverse. Moreover, it was decided at Circuit in 1844, and is not authority in the face of Backus *v.* Gould.

I have already noticed Reed *v.* Carusi.

The construction sought to be placed on Backus *v.* Gould is untenable. The contention in that case, as in this, was, that the jury could find from the number published that so many books had been found in the possession of defendant. But the Court held that the books must have been actually *found* in the possession of the defendant. Counsel for plaintiff, in speaking of the books in that case, say: "None had been in his possession." But the report of the case says the plaintiff "proved a sale by the defendant of *five hundred copies.*" So it is clear that to prove publications or sales amounts to nothing. The proof must be that copies are *found* in the actual possession of defendant. If the defendant has sold the copies before they are found in his possession, no action accrues to plaintiff.

In Thornton *v.* Schreiber, 124 U. S., 620, the Court say: "Counsel for defendant in error, "Schreiber & Sons, insist that the words 'found

" 'in his possession,' are to be construed as refer-
" ring to the finding of the jury ; that the expres-
" sion means simply that where the sheets are as-
" certained by the finding of the jury to have been
" at any time in the possession of the person who
" committed the wrongful act, such person shall
" forfeit one dollar for each sheet so ascertained to
" have been in his possession. We, however, think
" that the word 'found' means that there must be
" a time before the cause of action accrues at which
" they are *found* in the possession of the defend-
" ant." In other words the cause of action does not accrue until the sheets are actually *found* in possession. If they go out of possession before they are *found*, no cause of action can accrue. This is the plain construction of the statute. The word "found" is used in its ordinary acceptation. The plaintiff in error has proceeded upon the theory that he could establish a case for an enormous amount of penalty by showing how many copies were printed and sold. But the jury cannot ascertain it in that way. There must be proof that a number of copies were *found* in the possession of defendant before there can be any cause of action.

3 Law Rep. Qu. B., 395, cited by plaintiff's counsel, has nothing to do with the case, for there the statute gives the penalty for the copies *sold*. Counsel have left out the material part of the quotation and placed asterisks instead. The question in that case was merely whether the penalty was ten pounds for every book or for the whole. The case is totally inapplicable to this case.

V.

Counsel discuss in several places the alleged fu-

tility of the statute if they are held to the rule that a recovery must be based only on the number of copies they have actually found in possession. But they forget that defendants are not allowed to show their innocence of any intention to do wrong, or ignorance of the fact that a cut from which they print has been made from a copyrighted photograph. The very case plaintiff's counsel have cited (Millett *v.* Snowdon, 1 West. L. J., 240) shows that ignorance or innocence is no defense for a defendant.

See also Drone on Copyright, 403.

The position of counsel is:

Their client can give a photograph to be copied, and then claim it was only to be copied in one magazine of a publishing company and not in another of the same company; and if a cut is made of it and the terms of the gift are not strictly construed, and a defendant innocently copy it in all its magazines, he (the plaintiff) can claim $50,000 penalty, however innocent the defendant may be. The plaintiff can, like Shylock, demand his pound of flesh; but he winces when the same rigid requirement is made of him to abide the letter of the law! The law does not give this enormous penalty against both the designing and the innocent offender without placing some limitation on the greed of every little copyright holder. *He must find the copies in possession of the offender.*

Mr. Bayard, in his argument in Backus *v.* Gould, assigns several reasons for the law's giving the penalty only for the copies found in the defendant's possession:

"1st. Congress did not intend that an author "should lie by during the two years allowed for

"bringing his action, permitting another to pub-
"lish and vend his work during that time, and
"then recover * * * for every sheet so pub-
"lished. This would be laying a trap for his ruin,
"as I have shown that the penalty upon an ordi-
"nary edition might exceed $15,000, and, if it
"were a popular work, several such editions might
"be disposed of in the course of two years.

* * * * * *

"3d. Again, it might be that a person who had
"unintentionally violated a copyright by the pub-
"lication of a book, might, upon discovering that
"his publication was illegal, destroy the whole
"edition, and so relieve himself from the penalty.
"But according to the decision of the Circuit Court
"he would still be liable. If the intention of the
"Legislature was what the Circuit Court held it
"to have been, it would have been perfectly easy
"and most obviously proper to have expressed
"that intention, either by omitting the words
"'which may be found in his possession,' or by
"adding after the word 'sale' in the next line,
"the words, 'or which he may have sold or caused
"to be sold.'"

In Sarony *v.* Ehrich, 28 F. R., 80, Judge COXE said: "The section must be strictly construed
"(Backus *v.* Gould, 7 How., 798). No authority
"has been cited to sustain the proposition that
"when the piratical prints are out of the possession
"and beyond the control of the infringer the pro-
"prietor of the copyright can recover of him their
"value in an action at law. It would require an
"exceedingly strained construction, almost a dis-
"tortion of the act, to make it fit the present cir-
"cumstances. It is no answer to say that the
"remedy provided by law is ineffective; that the

" wrongdoer may escape the consequences of his " infringement; that the opportunity for redress " diminishes in proportion to the success of the in- " fringement, and ceases wholly when the wrong " is fully consummated. These arguments might, " with great propriety, be addressed to the law- " making power, and Congress could, perhaps, be " induced to render effectual, by a few simple " amendments, provisions which, in their present " form, are so obviously defective and inadequate. " With these considerations, however, the Courts " have nothing to do. They must deal with the " law as it is, not as it ought to be."

Counsel for plaintiff in error ask: "Must the plaintiff himself see them in the actual possession of the defendant?" I answer that was the probable intention of Congress, as only he and the defendant were contemplated as parties to the matter. If strangers had been contemplated, it would have been easy for the statute to say so. Moreover, strangers are not supposed to know of the copyright, and no duty would devolve on them to notify a person that he was innocently or wilfully infringing upon the rights of the copyright holder. It is certain that the printer does not find the copies in the possession of his employer, within the meaning of the statute; and it is equally clear that the selling agent does not find them in the possession of his principal, within the meaning of the statute. The finding must at least be done by some outside party. The plaintiff so understood the law when he sent his employer to the office of defendant. He only claims to have found *one* copy; and to prove printing by an employee and receipts for sale by an agent, against their protest, is not permissible or competent under

the statute. Such a construction as plaintiff contends for would ruin many an innocent publisher. If it ruined only the wilful pirates it would not matter; but there is no justice in ruining the innocent. The amount sued for in this case shows how wise Congress was to confine recoveries to copies *found in possession*, otherwise there would be no limit to recoveries against the innocent.

The defendant in this case is a publisher of magazines, and is more interested in upholding a just copyright law than the plaintiff. But plaintiff is contending for a construction unjust and contrary to the decisions of the Supreme Court.

SECOND.

The notice imprinted on the photograph did not fill the requirements of the statute.

SECTION 4962, PRESCRIBING THE FORMULA OF NOTICE MUST BE STRICTLY COMPLIED WITH.

In Baker *v.* Taylor, 2 Blatch., 84, the Court says:

"The Supreme Court of the United States, in the "case of Wheaton *vs.* Peters, 8 Pet. 591, has given "an exposition of our statutes, which is obligatory "on this Court, and essentially covers the main "question raised on this motion. The principle de- "clared by this decision is, that under the laws of "the United States *a copyright title is not perfected "without a strict compliance with the provisions of "the statute.* Those requirements which, in Eng- "land, are generally regarded as directory, and not

'as conditions precedent to title * * * are, "under our laws, important and indispensable pre-"requisites to a perfect title. Depositing the title "page in the proper clerk's office, *publishing a "notice according to the act*, and delivering a copy "of the book, are held to be conditions, the per-"formance of which is essential to the title. On "that authority I think the point is placed beyond "question, that the failure, in the present case, to "publish the notice demanded by the act, in the "manner directed, creates a fatal defect in the "plaintiff's title. (The defect in the notice was, "having the notice read: 'Entered according to "the Act of Congress, in the year 1847, by Baker & "Scribner, in the Clerk's office of the District Court "for the Southern District of New York;' whereas "the real date of entry was 1846). Even though "the failure to publish the statutory notice arose "from mistake, this Court would have no power to "accept the intention of the party, in place of a "performance, any more in respect to the insertion "of that notice on the proper page, than in respect "to the deposit of the title of the book.

"The plaintiffs knew of the error before the book "was published. They, however, regarded it as "trivial, and not worth the expense and trouble of "correction. But Congress, in the 5th Section of "the Act of 1831, have seen fit to make the copy-"right dependent upon the particular act giving "the notice; and. to mark its importance, the "statute sets forth the words in which the notice "shall be given. *The direction must be strictly "complied with.*"

In Jackson *v.* Walkie, 29 F. R., 16, the Court say:

"Since the decision of the Supreme Court of the "United States in Wheaton *vs.* Peters, 8 Pet.,

"591, it has been the recognized rule in this class "of cases that a party must bring himself *strictly* "within the terms of the statute in regard to copy- "right in order to protect his property in case of "publication."

Again the Court say:

"Argument seems hardly necessary to show that "the defendant in this case has not complied with "the statute in this regard. He has not given "either of the forms of notice which the statute "specifically requires him to give, in order to be "entitled to bring a suit for the protection of his "alleged copyright. (The notice there given was, "'Entered according to Act of Congress, in the "year 1878, by H. A. Jackson.') If an author or "proprietor of a book or literary work can change "the formula prescribed by the statute for his "notice of copyright to the public by omitting the "words left out of this notice, he may omit other "words, or adopt an entirely different form, or "may change the location of the notice. He may "think that the title page, or the page immediately "following, is not as good a place to print the "notice as some other place in the book, and may, "therefore, insist that he has a right to exercise "his own judgment as to *where he will print his* "*notice*, as well as the form in which it shall be "printed. *An author or proprietor of a work has* "*no right to say, in effect, that any part of the* "*prescribed notice is immaterial and may be* "*omitted.* He takes his copyright under the law "only by giving the notice, and *the entire notice*, "which the statute provides; and the statute "expressly declares that he shall not maintain an "action unless he has complied with this condition.

"Hence, I think the bill fails to show a valid "copyright in complainant."

The plaintiff's notice is defective:

I.—Because he has left out the figures "18" in the notice.

II.—He has not inscribed the notice visibly on the photograph, and he is estopped by such carelessness from a recovery against the plaintiff.

"The omission to cause the date of entry of a map "to be engraved on some visible portion thereof "will prevent a recovery."

King *v.* Force, 2 Cranch, C. C. R., 208.

In Higgins *v.* Keuffel, 24 Blatch., 331, the Court says:

"The exact form of the notice is prescribed by "law, and no equivalent is provided for nor any "room for improvement left. If that specific no- "tice is not given, the right of action otherwise "conferred is withheld. All the requirements of "law on which the right of action rests must be "complied with or the suit cannot be maintained. "* * * This notice ('Registered, 3693, 1883'), "is so defective that the publication of the label "with no other was the same in effect as the pub- "lication without any would have been. Such a "publication is practically an abandonment of the "copyright."

The Courts in this Circuit have thus consistently construed the statute strictly. And while that is so and the statute is perfectly plain—so plain that it actually contains the figures left out—this Court could not follow the case of Merckmeister *v.* Mfg. Co., 63 Fed. R., 445, 452, cited by plaintiff's coun-

sel, were it exactly in point. But even that case has an apostrophe in the place of the figures "18," whereas in our case there is no apostrophe even. Counsel say: "93, in the connection 'Copyright 93, Bolles, Brooklyn,' could mean nothing else than the year 1893." I answer that it could mean "No. 1893" or "1793." But counsel says there was no copyright law in this country in any "93" except "1893." The first copyright law passed by Congress was passed May 31, 1790 (see 1 Statutes at Large, 124).

THIRD.

The copyright claimed by Bolles is not sanctioned by the Constitution.

U. S. Cons., Art. I., § 8, says:

"The Congress shall have power * * * ; *To* "*promote the progress of science and useful arts* by "securing for limited times to *authors and in-*"*ventors* the exclusive right to their respective "*writing and discoveries.*"

Act of Congress, May 31, 1790, is entitled:

"An Act *for the encouragement of learning*, by "securing the copies of maps, charts and books, to "authors and proprietors of such copies, during "the time therein mentioned."

In Burrow-Gile Lith. Co. *v.* Sarony (111 U. S., 56), the Court say:

"Under the acts of Congress designed to give "effect to this section (Section 8 of Article I. of "the Const.), the persons who are to be benefited

" are divided into classes, *authors* and *inventors*.
" The monopoly which is granted to the former is
" called *copyright*; that given to the latter, *letters*
" *patent*, or, in the familiar language of the pres-
" ent day, patent right."
Again, at pages 57-8, the Court say:

" An author in that sense is 'he to whom any-
" thing owes its origin; originator, maker, one
" who completes a work of science or literature.'"
Again the Court say:

" By writings in that clause is meant the literary
" productions of those authors, and Congress very
" properly has declared these to include all forms
" of writing, printing, engraving, etching, etc., by
" which the ideas in the mind of the author are
" given visible expression."
Again the Court say:

" We entertain no doubt that the Constitution is
" broad enough to cover an act authorizing copy-
" right of photographs, *so far as they are repre-*
" *sentations of original intellectual conceptions*
" *of the author*."
Again the Court say;

" But it is said that an engraving, a painting, a
" print, does embody the intellectual conception of
" its author, in which there is novelty, inception,
" originality, and therefore comes within the pur-
" pose of the Constitution in securing its exclusive
" use or sale to its author, while the photograph is
" the mere mechanical reproduction of the physical
" features or outlines of some object animate or
" inanimate, and involves no originality of thought
" or any novelty in the intellectual operation con-
" nected with its visible reproduction in shape of
" a picture. * * * *This may be true in regard*

" *to the ordinary production of a photograph,* " and further, that *in such case a copyright is no* " *protection.* On the question as thus stated we " decide nothing."

Again the Court say:

" In regard, however, to the kindred subject of " patents for invention, they cannot by law be " issued to the inventor until the novelty, the " utility, and the actual discovery or invention by " the claiment have been established by proof be- " fore the Commissioner of Patents; and when he " has secured such a patent, and undertakes to " obtain redress for a violation of his right in a " court of law, *the question of invention, of* " *novelty, of originality, is always open to exam-* " *ination.*"

Again the Court say:

" Our copyright system has no such provision for " previous examination by a proper tribunal as to " the originality of the book, map, or other matter " offered for copyright. * * * It is, therefore, " much more important that when the supposed " author sues for violation of his copyright, *the ex-* " *istence of those facts of originality, of intellec-* " *tual production, of thought, and conception* on " the part of the author *should be proved,* than in " the case of a patent right."

Again the Court say:

" In the case before us we think this has been " done. The third finding of fact says, in re- " gard to the photograph in question, that it is a " 'useful, new, harmonious, characteristic, and " graceful picture, and that *plaintiff made the* " *same * * * entirely from his original men-* " *tal conception, to which he gave visible form by*

"POSING *the said Oscar Wilde in front of the "camera, selecting and arranging the costumes, "draperies, and other various accessories in said "photograph, arranging the* SUBJECT *so as to "present graceful outlines, arranging and dis- "posing the light and shade, suggesting and "evoking the desired expression, and from such "disposition, arrangement, or representation, "made entirely by plaintiff, he produced the "picture in suit.'*

"*These findings, we think, show this photograph "to be an original work of art, the product of "plaintiff's intellectual invention, of which the "plaintiff is the author.*"

In Falk *v.* Donaldson, 57 Fed. R., 33, the Court say:

"The question is whether the *artist was Miss "Marlowe, or complainant.* How far the artistic "contributions are to be attributed to the talent of "Miss Marlowe, it is impossible to say. The tes- "timony of complainant as to his share in pro- "ducing the result is not denied. *He was an "*ARTIST *before he became a photographist.*"

In Clayton *v.* Stone, 2 Payne R., 382, the Court say:

"The object of the act is the *encouragement of "learning*, and was not intended for the encourage- "ment of *mere industry.*"

In Thornton *v.* Schreiber, 124 U. S., 613, the Court say:

"Photographs are included *under certain cir- "cumstances* among the things which may be "copyrighted."

But a photograph must be such as to promote

science, in order to be entitled to protection under the statute.

In Baker *v.* Selden, 101 U. S., 105, the Court say:

"Although great praise may be due to the "plaintiffs for their industry and enterprise in "publishing this paper, yet the law does not con- "template their being rewarded in this way: It "must get its patronage and protection from its "utility to the public, and not as a work of "science."

If any other rule prevailed, those who were most industrious would monopolize the business of photographing inanimate objects. The first comer would photograph a yacht from its various sides; and every other photographer would be a pirate.

It is well known that only from one spot can the best view be gotten of certain objects. It would retard instead of "promote" the progress of science and useful arts to give one person the sole right to take and sell photographs of objects from those views. And yet that is what plaintiff is claiming. He does not claim that he took hold of the yacht and created a position as was done with Oscar Wilde and Miss Marlowe. What he claims, is that he was in the position from which he could get the best view of the yacht and then took the photograph. He does not claim to have reached his hand up to the clouds and drawn them as curtains about, so as to make the lights and shadows about the yacht. He merely claims to have seen them (Tr., p. 13). The other part of making the snapshot and developing the negative, &c., was the ordinary routine of a photographer. And this photograph, as the exhibit shows, is merely an ordinary photograph. Three other photographers there making photographs at the time, and doubtless

many of them looked like that taken by Bolles. It would not be hard for some of them to be better. Doubtless he careered about in his tugboat a good deal, propelled by his "artistic temperament"; but he did not create the poise of the *Vigilant*. He only saw her as other people behind or in front, and perhaps beside him, saw her. He may have been industrious to get to that point of view; but such industry was never intended by the Constitution to give a monopoly of that view. He might, perhaps, under the common law restrain the use of his photograph; but he has no right to have it copyrighted. The copyright is invalid.

FOURTH.

This case is wholly without merit.

Plaintiff put in evidence part of the correspondence, viz., Letters Exhibits 2, 3 and 4, but he did not put in Exhibit 5 (see Tr., pp. 19, 25-26); and now his counsel say in their statement of facts: "The defendant in error had no permission, either printed or verbal, to use the photograph" (see Pltff's. Brief, p. 2). But even what he did put in shows that the defendant was no pirate (Tr., p. 26). And such a demand as the plaintiff's shows only a spirit of marauding. If the statute were construed as he wishes, the innocent publishers, as well as the pirates, would be at the mercy of the holders of small and insignificant copyrights. I know nothing of the important cases in many circuits being held over for this decision. Doubtless, if the rule in Gould *v.* Backus were reversed, there

would be many such cases as this. But I submit that that decision is still the law, as it has been for nearly fifty years, and is but the declaration of the plain terms of the statute.

FIFTH.

I submit that the writ of error should be dismissed with costs to defendant in error.

JOHN R. ABNEY,
Attorney for Defendant in error.

JOHN R. ABNEY,
Of Counsel.

BOLLES *v.* OUTING COMPANY.

ERROR TO CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 47. Submitted October 16, 1899. — Decided December 4, 1899.

In an action under Rev. Stat. § 4965 to recover a penalty of one dollar for every copy of an engraving or photograph infringing the copyright of another, the plaintiff's recovery is limited to copies actually found in the possession of the defendant, and does not extend to copies already sold and put in circulation.

A party who does not take out a writ of error will not be heard to complain of adverse rulings in the court below.

THIS was an action begun April 18, 1894, by Charles E. Bolles, a resident of the city of Brooklyn, New York, for the penalty provided for the infringement of the copyright of a photograph, by Rev. Stat. sec. 4965. This section enacts that "if any person, after the recording of the title of any map, chart, musical composition, print, cut, engraving or *photograph*, . . . as provided by this chapter, shall, within the time limited, and without the consent of the proprietor of the copyright first obtained in writing, signed in presence of two or more witnesses, engrave, etch, work, copy, print, publish

or import, either in whole or in part, or . . . shall sell or expose to sale, any copy of such map or other article, as aforesaid, he shall forfeit to the proprietor all the plates on which the same shall be copied, and every sheet thereof, either copied or printed, and shall further forfeit one dollar for every sheet of the same *found in his possession*," etc.

In August, 1893, plaintiff made a photograph of the yacht "Vigilant" under full sail, and copyrighted the same under the title "Vigilant, No. 4." The copyright stamp on the photograph was made by impressing at the lower end of the right-hand corner of the photographs the words "Copyright 93, by Bolles, Brooklyn," Bolles being the trademark name used by the plaintiff.

Defendant made a photogravure of this photograph, and published it November, 1893, in a magazine published by it in New York known by the name of "The Outing." Defendant had no permission to use or copy the photograph.

One copy of this number of The Outing was purchased of the defendant by an employé of the plaintiff for the sum of twenty-five cents.

On the first trial in the Circuit Court the action was dismissed upon the ground that the copyright stamp on the photograph was insufficient notice of the copyright, because the year was not given in full, nor the full name of the owner.

Thereupon plaintiff sued out a writ of error from the Circuit Court of Appeals, which held that the copyright stamp was sufficient, but sustained the trial court in its exclusion of certain evidence offered as to the number of copies found in the possession of the defendant. 77 Fed. Rep. 966.

Upon the new trial the same evidence as to the number of copies of the infringement found in the possession of the defendant was excluded, and a verdict directed for plaintiff for one dollar penalty for the one copy bought by plaintiff's employé from the defendant. Plaintiff moved for a new trial because of the refusal of the court to permit him to prove the the number of copies which had been in the defendant's possession at any time within the two years previous to the commencement of the suit. Upon his motion being denied, he

again sued out a writ of error from the Circuit Court of Appeals, which affirmed the judgment. Whereupon plaintiff sued out a writ of error from this court.

Mr. George E. Waldo for plaintiff in error.

Mr. John R. Abney for defendant in error.

Mr. Justice Brown, after stating the case, delivered the opinion of the court.

Whether the court erred in excluding the evidence offered by the plaintiff tending to show the number of copies of the issue of The Outing, containing a reproduction of the plaintiff's photograph, which had been printed and delivered to the defendant at any time within two years prior to the commencement of this action, is the sole question presented by the assignments of error.

This is an action to recover a penalty of one dollar for every copy of the plaintiff's photograph, and is based upon Revised Statutes, section 4965, which declares that any person offending against its provisions "shall forfeit to the proprietor all the plates on which the same shall be copied, and every sheet thereof, either copied or printed, and shall further forfeit one dollar for every sheet of the same found in his possession, either printing, printed, copied, published, imported or exposed for sale, . . . one half thereof to the proprietor and the other half to the use of the United States." This is clearly a penal statute in that it fixes a single and arbitrary measure of recompense to the plaintiff, irrespective of the damages actually sustained by him, or of the profits realized by the defendant; and in the further provision that one half of the amount recovered shall be to the use of the United States. It makes no pretence of awarding damages, and simply imposes a forfeiture of a specified sum. In this respect it differs wholly from the following section (4966) recently considered by us in *Brady* v. *Daly*, *ante*, 148, which made a person performing or representing any copyrighted dramatic composition "liable for damages therefor,

. . . to be assessed at such sum, not less than $100 for the first and $50 for every subsequent performance, as to the court shall appear to be just." There the award was of damages, and a minimum sum was fixed apparently to cover cases where it was impossible to estimate such damages; but there was no limit to the amount which might be awarded if, in the opinion of the court, it were just to increase the minimum. The idea suggested by the learned judge who delivered the opinion of the court, that as it would be difficult to prove the exact amount of damages suffered by reason of the unlawful representation, the statute provided a minimum sum, leaving it open for a larger recovery upon proof of greater damages, has no application to the section under consideration, where the plaintiff can recover no greater nor less damages than the penalty provided by the section. The penal character of the act is further emphasized by the fact that the plaintiff apparently recovers a moiety for the use of the United States, though perhaps this is not beyond a doubt suggested in *Thornton* v. *Schreiber*, 124 U. S. 612. The act of 1831, for which this act is a substitute, and of the sixth section, of which section 4965 is a substantial copy, was said by this court in *Backus* v. *Gould*, 7 How. 798, 811, to give a *qui tam* action for the sum forfeited.

The statute, then, being penal, must be construed with such strictness as to carefully safeguard the rights of the defendant and at the same time preserve the obvious intention of the legislature. If the language be plain, it will be construed as it reads, and the words of the statute given their full meaning; if ambiguous, the court will lean more strongly in favor of the defendant than it would if the statute were remedial. In both cases it will endeavor to effect substantial justice. *United States* v. *Hartwell*, 6 Wall. 385; *United States* v. *Wiltberger*, 5 Wheat. 76, 95; *American Fur Co.* v. *United States*, 2 Pet. 358; *United States* v. *Reese*, 92 U. S. 214.

The language of this section when examined seems hardly susceptible of two interpretations, unless certain words which are not found there are treated as interpolated. It forfeits to the proprietor of the pirated publication all the plates on which the same shall be copied, and every sheet thereof, either

copied or printed, and shall further forfeit one dollar for every sheet of the same *found in his possession.* No remedy is provided by the act, although by section 4970 a bill in equity will lie for an injunction; but the provision for a forfeiture of the plates and of the copies seems to contemplate an action in the nature of replevin for their seizure, and in addition to the confiscation of the copies, for a recovery of one dollar for every copy so seized or found in the possession of the defendant. While the forfeiture is not limited as to the number of the copies, it is limited to such as are found in, and not simply traced to, the possession of the defendant. Congress may have been perfectly willing to impose a forfeiture of one dollar for every such copy, and have been reluctant to impose it upon the thousands of such copies that may have previously been put in circulation. The construction contended for would permit an author to lie by during the two years allowed him for bringing suit, permit another to publish the work during that time, and then recover for every copy so published. Not only this, but as the penalty is imposed upon any person who engraves, copies, prints, publishes or sells a copy, not only the publisher, but the printer and bookseller might be liable for every copy traced to his possession. Indeed, the defendant might be made liable for every copy traced to his possession, even though he destroyed the whole edition for the purpose of relieving himself from the penalty.

This case is clearly controlled by that of *Backus* v. *Gould*, 7 How. 798. This was an action of debt brought by Gould and Banks to recover penalties incurred by the invasion of plaintiffs' copyright in twelve volumes of law reports. Defendant insisted that plaintiff could only recover for such sheets as were proved to have been found in his possession, either printing or printed, published or exposed for sale. Plaintiffs insisted, as the plaintiff does here, that they were entitled to recover for every sheet which had been published, or procured to be published, by the defendant, whether the same were proved to have been found in the defendant's possession or not. The language of the forfeiting clause, section six of the act of February 3, 1831, c. 16, 4 Stat. 436, 437, was that

"such offender shall forfeit every copy of such book to the person legally, at the time, entitled to the copyright thereof; and shall also forfeit and pay fifty cents for every such sheet which may be found in his possession, . . . one moiety thereof to such legal owner of the copyright aforesaid, and the other to the United States." The recovery was held to be limited to the sheets in the possession of the defendant, and an instruction that he was liable for every sheet which he had published, or procured to be published, was held to be erroneous.

That case was decided in 1849, and must be regarded as overruling anything to be found to the contrary in *Reed* v. *Carusi*, Taney Dec. 72; *S. C.*, 20 Fed. Cases, 431, decided by Chief Justice Taney in 1845; *Dwight* v. *Appleton*, 8 Fed. Cases, 143, decided in 1843, and *Millett* v. *Snowden*, 17 Fed. Cases, 374, decided in 1844.

The case of *Thornton* v. *Schreiber*, 124 U. S. 612, was a *qui tam* action brought against Thornton under section 4965 for the unlawful reproduction of a certain copyrighted photograph. The case turned upon the fact whether the sheets were found in the possession of the defendant. They were actually found in the store of Sharpless & Sons, wholesale dealers in dry goods, were used by pasting them upon parcels of dry goods, and were their property. Thornton was employed for the purchase of goods sold by the firm, and he appears to have gotten up the plate, ordered fifteen thousand copies to be made, which were subsequently delivered to Sharpless & Sons, who paid for them. Attempt was made to establish the fact that Thornton had the possession of these prints, by showing that he was the man who first conceived the idea of getting them up and using them in the business of the firm. It was held that Thornton could not be considered to have held possession of them, but that an action of replevin could have been sustained against the firm, and that they were the proper parties to be made defendants. The same argument was made as in *Backus* v. *Gould*, that the words, "found in his possession," meant simply that, where the sheets are ascertained by the finding of the jury to have

been at any time in the possession of the defendant, the forfeiture attached; but it was held that the only possession defendant had was that of Sharpless & Sons, and that he held them merely as their employé, subject always to their order and control. While *Backus* v. *Gould* is not cited in the opinion, the case is a distinct affirmance of that. See also *Sarony* v. *Ehrich*, 28 Fed. Rep. 79.

Had Congress designed the extended meaning claimed for these words "found in his possession," it would naturally have used the expression "found or traced to his possession," or "found to be, or to have been, in his possession." It is only by interpolating words of this purport that the statute can receive the construction claimed. We concur with the learned judge who spoke for the Court of Appeals that the words "found in his possession" aptly refer to a finding for the purposes of forfeiture and condemnation. "The remedy by forfeiture and condemnation is only appropriate in a case where the property can be seized upon process, and where, as here, the forfeiture declared is against property of the 'offender' is only appropriate when it can be seized in his hands."

Two other defences are interposed which go to the recovery of even the small judgment of one dollar and costs, and which, if sustained, would require the judgment of the court below to be reversed, and ultimately a verdict for the defendant. First, that the notice of the copyright, imprinted on the photograph, did not fill the requirements of the statute; and, second, that the copyright claimed by Bolles is not sanctioned by the Constitution. It is sufficient to say of these that the defendant did not take out a writ of error, and cannot now be heard to complain of any adverse rulings in the court below. *Canter* v. *American &c. Ins. Co.*, 3 Pet. 307, 318; *Chittenden* v. *Brewster*, 2 Wall. 191; *The Maria Martin*, 12 Wall. 31, 40; *The Stephen Morgan*, 94 U. S. 599; *Clark* v. *Killian*, 103 U. S. 766; *Loudon* v. *Taxing District*, 104 U. S. 771; *Cherokee Nation* v. *Blackfeather*, 155 U. S. 218.

The judgment of the court below is

Affirmed.

Mr. Justice White concurred in the result.